Oklahoma Law Review

Volume 61 | Number 1

2008

Symbolic Speech: A Message from Mind to Mind

James M. McGoldrick Jr.
Pepperdine U, james.mcgoldrick@pepperdine.edu

OKLAHOMA
LAW REVIEW

VOLUME 61 SPRING 2008 NUMBER 1

SYMBOLIC SPEECH: A MESSAGE FROM MIND TO MIND

JAMES M. MCGOLDRICK, JR.*

Introduction

"Judge: Lap Dances Protected By Constitution"[1]

This headline may read like it came from *The Onion*,[2] but it was very real. Although the United States Supreme Court has recognized that symbolic acts can fall within the First Amendment's protection of free speech,[3] the Court would likely not go as far as the Salem, Oregon judge who said that lap dances

* James McGoldrick is a professor of law at Pepperdine University School of Law. He wishes to thank Dean Kenneth Starr for his generous support of faculty scholarship through the summer research grant program. He also acknowledges the remarkable skill and effort of Gary Sholes, his research assistant.

1. Associated Press, *Judge: Lap Dances Protected by Constitution*, FOXNEWS.COM, July 2, 2007, http://www.foxnews.com/story/0,2933,287667,00.html [hereinafter *Protected Lap Dances*].

2. *See* The Onion—America's Finest News Source, http://www.theonion.com (last visited Mar. 1, 2008). The satirical online newspaper featuring headlines such as, but not including, "New Blackberry for Those with Non-opposable Thumbs." I apologize for this humble effort to replicate *The Onion*'s genius.

3. The first Supreme Court case finding a law in violation of the First Amendment Free Speech Clause also involved symbolic speech. *See* Stromberg v. California, 283 U.S. 359 (1931). The case concerned a displayed red communist replica flag at a Young Communist League youth camp. *Id*. at 362. The earliest case involving symbolic speech decided by the Supreme Court was *Halter v. Nebraska*, 205 U.S. 34 (1907), but it was decided before the Court had held that the First Amendment applied to the states. In *Halter*, a beer bottle had an American Flag representation, a violation of a state statute. *Id*. at 38. The Court noted that over half of the states had similar limitations on use of our national symbol. *Id*. at 39-40. The Court found that no Fourteenth Amendment provisions were violated. *Id*. at 44-46.

are protected by the Oregon Constitution's free speech provisions.[4] The judge's ruling struck down a city ban on "prohibited touching"—sexually exciting, physical contact for pay—and freed the twenty-four-year old exotic dancer at Salem's renowned Cheetah's Club to continue the exercise of her cherished free speech rights.[5] As the headline illustrates, the line between protected symbolic speech and unprotected conduct is anything but clear.

The Constitution itself protects only "the freedom of speech,"[6] but the Supreme Court has long interpreted this broad language as protecting symbolic gestures and conduct.[7] Some justices distinguish between what was called "pure speech,"[8] which is fully protected as speech, and symbolic speech, also called "speech plus"[9]—speech plus *conduct*, which might be only partially

---

4. *Protected Lap Dances*, *supra* note 1.

5. *Id.*

6. U.S. CONST. amend. I. In *Gitlow v. New York*, 268 U.S. 652, 666 (1925), the Court assumed that the Fourteenth Amendment's Due Process Clause included the Free Speech Clause of the First Amendment. Unlike some of the later cases where the Court agonized over whether a particular provision of the Bill of Rights was applicable to the states through the Fourteenth Amendment's Due Process Clause, such as *Duncan v. Louisiana*, 391 U.S. 145 (1968) (discussing the Sixth Amendment right to a jury trial), the Free Speech Clause was assumed to be applicable to the states in *Gitlow* with little discussion at all. *Gitlow*, 268 U.S. at 666.

7. In 1943, the Court in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), found that refusing to say the Pledge of Allegiance was protected free speech. The Court said, "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind." *Id.* at 632.

8. The Court in *Cox v. Louisiana*, 379 U.S. 536, 555 (1965), used the term for the first time, distinguishing between "patrolling, marching, and picketing on streets and highways" and "those who communicate ideas by pure speech." In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505-06 (1969), the Court referred to the wearing of black arm bands as "closely akin to 'pure speech.'" In *Bigelow v. Virginia*, 421 U.S. 809, 817 (1975), the Court referred to a classified advertisement for abortion services as "pure speech" as opposed to commercial speech. The Court in *Virginia v. Hicks*, 539 U.S. 113, 124 (2003) (citing Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)), in discussing the overbreadth doctrine, said that "the overbreadth doctrine's concern with 'chilling' protected speech 'attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct.'" In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 588 n.5 (1980) (Brennan, J., concurring), Justice Brennan's concurrence in a case involving the access of the press to a criminal trial said, "Some behavior is so intimately connected with expression that for practical purposes it partakes of the same transcendental constitutional value as pure speech."

9. In *Thomas v. Collins*, 323 U.S. 516, 540 (1945), the Court distinguished between the labor organizing in that case and "the collection of funds or securing subscriptions," which it said "would be free speech plus conduct." Justice Douglas's dissent in *Beauharnais v. Illinois*, 343 U.S. 250, 284 (1952) (Douglas, J., dissenting), referred to Hitler's race-destroying policies as "more than the exercise of free speech. Like picketing, it would be free speech plus." Justice

protected.[10] An example of symbolic speech in action is when David O'Brien burned his draft card to protest the Vietnam War.[11] The Court assumed that the illegal act of destroying his draft card was symbolic speech, but unprotected because of the government's overriding interest in protecting the Selective Service System.[12] In *United States v. O'Brien* the Court stated "that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[13]

Harlan in dissent in *NAACP v. Button*, 371 U.S. 415, 455 (1963) (Harlan, J., dissenting), objected to the treatment of litigation as speech. He said, "But litigation, whether or not associated with the attempt to vindicate constitutional rights, is *conduct*; it is speech *plus*." *Id.* at 455. Justice Douglas, concurring in *Brandenburg v. Ohio*, 395 U.S. 444, 455 (1969) (Douglas, J. concurring), said, "Picketing, as we have said on numerous occasions, is 'free speech plus.'"

10. The actual terms "pure speech" and "speech plus" have not often been used by the Supreme Court in the same case. One of the few to use both terms was *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), *overruled on other grounds by* Hudgens v. NLRB, 424 U.S. 507 (1976). Even in *Logan Valley*, the majority only referred to pure speech: "To be sure, this Court has noted that picketing involves elements of both speech and conduct, *i.e.*, patrolling, and has indicated that because of this intermingling of protected and unprotected elements, picketing can be subjected to controls that would not be constitutionally permissible in the case of pure speech." *Id.* at 313. In contrast, the concurring opinion referred to speech plus: "Picketing is free speech *plus*, the *plus* being physical activity that may implicate traffic and related matters. Hence the latter aspects of picketing may be regulated." *Id.* at 326 (Douglas, J., concurring). In the only other case to use both terms, *New York v. Ferber*, the Court, in discussing the overbreadth doctrine, referred to restrictions on political campaign activity as "an area not considered 'pure speech'" and then mentioned that the requirement of substantial overbreadth applied "'at the very least' to cases involving conduct plus speech." 458 U.S. 747, 771 (1982). Professor Harry Kalven, my favorite professor at the University of Chicago Law School, used to say that there was no such thing as pure speech, that instead all speech was speech plus, speech plus litter or speech plus noise. Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 23. *Compare* Lewis Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 79 (1968) ("A constitutional distinction between speech and nonspeech has no content. A constitutional distinction between speech and conduct is specious. Speech *is* conduct, and actions speak. There is nothing intrinsically sacred about wagging the tongue or wielding a pen; there is nothing intrinsically more sacred about words than other symbols.").

11. United States v. O'Brien, 391 U.S. 367, 369 (1968).

12. *Id.* at 367, 382.

13. *Id.* at 376. The *O'Brien* Court does not in fact cite any authority for this claim, but it seems a simple enough reference to the Court's earlier time, place, and manner cases, such as *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). In *Cox*, the Court found a violation of free speech in a case involving marching and picketing, but it said that it "emphatically reject[ed] the notion" that such things were afforded the same First Amendment protection as afforded "to those who communicate ideas by pure speech." *Id.*

And then there is mere conduct that, though expressive, receives no protection as speech at all and can be regulated for any rational reason.[14] Some expressive conduct is treated as speech, and some as just conduct, but there is no easy way to tell them apart. The Supreme Court has said persons attempting to draw attention to their opinions are "not [to] be justified in ignoring the familiar red traffic light."[15] On the other hand, the Court has found conduct that disrupts traffic—by marching, picketing or demonstrating —is protected by the First Amendment.[16] Yet, it is incredibly difficult to define why some expressive conduct is speech and why other expressive conduct is not; why ignoring the red light is not speech but marching down the middle of the street may be.[17]

---

14. For any conduct not so expressive that it is protected as free speech, generally the government can regulate the conduct or forbid the conduct entirely if the government has some rational basis for doing so. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943):

> The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.

See also Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 496 (1997) (Souter, J., dissenting) (citation omitted):

> Of course, when government goes no further than regulating the underlying economic activity, this sort of piecemeal legislation in answer to expressions of interest by affected parties is plainly permissible, short of something so arbitrary as to fail the rational basis test. But when speech is at stake, the government fails to carry its burden of showing a substantial interest when it does nothing more than refer to a "consensus" within a limited interest group that wants the regulation.

An argument could be made for use of the more searching rational basis cases with regard to expressive conduct that does not qualify as symbolic speech. The Court has used a more searching rational basis test in a number of recent cases, but usually only in those cases where the Court believes that some politically powerless group has been singled out for mistreatment. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985). It is certainly possible that even expressive conduct that does not qualify as speech should be accorded at least the protection of a more searching rational basis analysis because of its closeness to speech and because of the importance of speech to the political process.

15. Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

16. Cox v. Louisiana, 379 U.S. 536 (1965). In large part, free speech rights were violated in this case because of the discriminatory application of laws regulating parades and demonstrations. *Id.* at 555-57. Perhaps coincidentally, the Court noted that the civil rights activists stopped at the red light on their way to the mass protest. *Id.* at 540.

17. Justice Hugo Black is an extreme example. He believed that speech was absolutely protected, but did not believe that conduct was ever protected as speech. *See, e.g.*, Cox v. Louisiana, 379 U.S. at 578 (Black, J., dissenting) ("The First and Fourteenth Amendments, I think, take away from government, state and federal, all power to restrict freedom of speech,

Some expressive conduct seems to be a form of pure speech every bit as much as words. A gesture of a middle finger thrust into the air, directed from one driver to another driver, seems to be speech at its purest form, free of obstructive noise or tangible remains. The message moves effortlessly from enclosed metal and glass across lanes of traffic into the enclosed space of another, all with little difficulty, yet with great force and often psychic injury.[18] Still, no one would think that all of the symptoms of road rage—tailgating, aggressive lane changes, and in some cases the use of guns—would be protected symbolic speech. There lies the essence of the problem. We accept some gestures as falling within free speech parameters, and others we simply classify as antisocial behavior that may be criminalized without regard to the constitutional protection of the freedom of expression.

This article will explore the difficult task of distinguishing between expressive conduct that should be treated as speech, whether called pure speech or speech plus, and expressive conduct that is simply conduct. In Part I, this paper will briefly trace the Supreme Court's historical treatment of symbolic speech. In *West Virginia State Board of Education v. Barnette*, the Court, in eloquent language, called symbolic gestures "a short cut from mind to mind."[19] The more modern test comes from *Spence v. Washington*,[20] which defined symbolic speech as being "imbued with elements of communication" and having "a particularized message" as to which "the likelihood was great that the message would be understood."[21] Part II defines all symbolic speech cases as falling within three categories: (1) gestures and symbols whose meanings are almost instantly known; (2) things closely associated with speech, like marching and picketing, which are better classified as aids in communicating than communication itself; and (3) play acting or theater pieces, like the burning

---

press, and assembly *where people have a right to be for such purposes*. . . . Picketing, though it may be utilized to communicate ideas, is not speech, and therefore is not of itself protected by the First Amendment."); *see also* Brown v. Louisiana, 383 U.S. 131, 166 (1966) (Black, J., dissenting) ("The First Amendment, I think, protects speech, writings, and expression of views in any manner in which they can be legitimately and validly communicated. But I have never believed that it gives any person or group of persons the constitutional right to go wherever they want, whenever they please, without regard to the rights of private or public property or to state law.").

18. Personally, my own proclivity at being unable to intuit who is in my driving blind spot has perhaps made me more aware of this particular gesture than most. For whatever its power to injure, I resent it less than the direct look and self righteous, "what were you thinking" shrug that often follows; the shrug being another effective—and mean-spirited—form of symbolic speech.

19. *Barnette*, 319 U.S. at 632.

20. 418 U.S. 405 (1974) (per curiam).

21. *Id.* at 409, 411.

of the flag, which grab our attention like few other things can. Part III refutes the common claim that the government has "a freer hand" in regulating symbolic speech than pure speech.[22] In Part IV, the article focuses on the *Spence* case and later Supreme Court cases involving symbolic speech. Part V traces the lower courts' application of *Spence*. Finally, in Part VI, the article summarizes the current status of the *Spence* test.

I. A Brief Historical Overview

In 1943, the Court in *Barnette* called symbolic speech, "a short cut from mind to mind."[23] *Barnette*'s memorable "mind to mind" phrase captures something important about symbolic speech, reflecting the power of an idea that it can move across space without any sound waves being activated and without use of our clever alphabetic symbols.[24] *Spence* defined symbolic speech as "[being] imbued with elements of communication" and having "a particularized message" as to which "the likelihood was great that the message

---

22. Texas v. Johnson, 491 U.S. 397, 406 (1989).

23. *Barnette*, 319 U.S. at 632. Although *Barnette* is also viewed as a Free Exercise of Religion case, the Court found that the refusal to recite the Pledge of Allegiance by a public school student was protected by the right not to speak, part of the protection of the Free Speech Clause of the First Amendment. *Id.* at 633-34. There have been few better ringing endorsements regarding symbolic speech's value:

> Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. . . . A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

Id. at 632-33. Justice Brennan said, concurring in *Regan v. Time, Inc.*, 468 U.S. 641, 678 n.15 (1984) (Brennan, J. concurring): "In describing the expressive value of symbols like that at issue here, it is difficult, as is so often the case, to improve upon Justice Jackson's eloquence [in *Barnette*]. . . ."

24. Compare Professor Akhil Reed Amar who says that "words are themselves symbols," formed by our 26 letters. Akhil Reed Amar, Comment, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 134 (1992). He continues that there is no difference "between the letters 'NAZI' and the crooked cross swastika hieroglyph" or between the phrase "American flag and the unique red, white, and blue, star-spangled symbol impressed upon banners." *Id.* Of course, he is wrong, as I am sure he would admit. The symbols of the swastika and the flag are far more communicative than would be just the synonymous words, going directly from mind to mind with power to inspire and power to injure. Sticks and stones can only break our bones; symbols can make us cry.

would be understood."[25] *Barnette*'s notion that powerful ideas are being communicated by symbols, and perhaps being suppressed because of their power, might be a better common sense guide to what should be protected as speech than what is often a more pedestrian *Spence* approach. Unfortunately, the powerful, almost intuitive, imagery of *Barnette* does not suggest how it might be applied by other courts. The appealing functionality of *Spence*'s test has made it the more common approach used by the lower courts to identify whether expressive conduct will be treated as symbolic speech.[26]

The Supreme Court has long recognized that symbolic speech was protected by the Free Speech clause of the First Amendment, but it has done too little to help define it or to indicate how its protection might differ from aural or written forms of speech. In *O'Brien*, perhaps the Court's most famous symbolic speech case, the Court found that not all expressive conduct is speech, but was willing to assume that burning a draft card in protest of the Vietnam War was speech.[27] The Court then concluded that even if it was speech, it was not protected and could be punished as a violation of Selective Service rules which prevented the draft card's destruction.[28] This is a pattern the Supreme Court has followed in a number of cases, assuming that something was speech and then finding it unprotected in any event.[29] In two cases involving nude dancing, the plurality did find that speech was involved, but only marginally so and in turn applied an equally marginal free speech approach.[30] Perhaps, other than O'Brien, the

25. *Spence*, 418 U.S. at 409, 411.

26. *See infra* note 348 and accompanying text.

27. United States v. O'Brien, 391 U.S. 367, 376 (1968).

28. *Id.* at 382.

29. Laurie Magid calls this the "fails anyway" approach, which she describes as allowing a court to avoid deciding whether something is speech by assuming that it is and concluding that is not protected in any event. Laurie Magid, Note, *First Amendment Protection of Ambiguous Conduct*, 84 COLUM. L. REV. 467, 473 (1984). *O'Brien* is an example of this, but this is actually a pattern the Court has followed since its first application of the Free Speech Clause to the states. In 1925, the Court in *Gitlow v. New York* assumed that the First Amendment applied to the states through the Due Process Clause of the Fourteenth Amendment, but concluded that speech advocating the overthrow of the government was not protected speech, and the New York law criminalizing it was thus valid. Gitlow v. New York, 268 U.S. 652, 666 (1925). The Court warned, "A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration." *Id.* at 669.

30. City of Erie v. Pap's A.M., 529 U.S. 277 (2000); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991). In *Pap's A.M.*, the plurality said that just being nude was "not an inherently expressive condition," but that, as it had held in *Barnes*, "nude dancing of the type at issue here [totally nude erotic dancing] is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection." *Pap's A.M.*, 529 U.S. at 289 (plurality opinion) (citing *Barnes*, 501 U.S. at 565-66). In *Barnes*, only Justice Scalia thought that topless dancing presented no free speech issue at all. *Barnes*, 501 U.S. at 572 (Scalia, J., concurring). Scalia stated, "In my view, however, the challenged regulation must be upheld, not because it

most significant case assuming the presence of free speech was *Clark v. Community for Creative Non-Violence*, where the court assumed that sleeping in Lafayette Park to protest the treatment of the homeless was free speech.[31] Likely, it is no coincidence that neither the topless dancing cases nor the homeless sleeping case yielded very careful application of free speech doctrines. Once the Court finds that expressive conduct is at the outer ambit of speech or assumes that dubious symbolic conduct is speech, it is little wonder that it does not take seriously the free speech issue itself.[32] This is one of the problems of an inadequate definition of symbolic speech. The courts will simply assume that speech is involved to move the case forward to an inadequate analysis of free speech, resulting in ever-weakening precedents regarding the protection of free speech rights. This failure to distinguish between speech and mere conduct means that in some instances the courts will fail to accord expressive conduct the protection it deserves, while in other instances, the courts will trivialize free speech by protecting simple conduct as though it contributed to some meaningful exchange of ideas. *O'Brien* is an example of the former, and the two topless cases, *Barnes* and *Pap's A.M.*, may be examples of the latter.

The Court could have treated all expressive conduct as free speech and simply balanced competing interests against the free speech claims. Another approach could have limited free speech to the written or oral forms, gradually

---

survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all." *Id.* Perhaps a low point in Supreme Court judicial discourse is found in *Barnes*, where Scalia's concurring opinion and White's dissenting opinion debate whether 60,000 Hoosiers could display their genitals to each other in the Hoosier Dome, or indeed in their own private homes. *See id.* at 575; *id.* at 595 (White, J. dissenting). According to a well known authority on zoning law, an attempt to actually replicate this hypothetical was turned down by Hoosier Dome officials as being likely in violation of Indiana law. 2 EDWARD H. ZIEGLER ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 24:10 n.15 (4th ed. 2007) (citing *See What Scalia (Almost) Had Wrought*, NAT'L L.J., Sept. 30, 1991, at 6). Of perhaps more interest in Ziegler's summary of nude dancing cases are the citations to dozens of state cases raising the *Barnes* issue. *Id.* § 24:10 nn.17-18.

31. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("We need not differ with the view of the Court of Appeals that overnight sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment. We assume for present purposes, but do not decide, that such is the case, but this assumption only begins the inquiry." (citation omitted) (footnote omitted)).

32. Justice Marshall in dissent in the *Clark* case makes this same complaint. *See Clark*, 468 U.S. at 312-13 (Marshall, J., dissenting).

expanding it to movies,[33] video games,[34] etc., as form and need required. The first approach would seem to grant expressive, but destructive, behavior far more weight than it might deserve. The second approach would not be adequately protective of the many obvious forms of symbolic conduct that do not fall within traditional forms, but are deserving of protection. Instead, the Court in *Spence* sought to define a somewhat limited test to determine when expressive conduct would be treated as speech. Given the difficulty of distinguishing between the almost impossible varieties of both speech and expressive conduct, perhaps any effort by the Court was bound to fail. Still, one might have hoped for more.

II. Types of Symbolic Speech

There are an infinite variety of types of symbolic speech and any attempt to categorize them into a smaller number of groupings is bound to fail. Nevertheless, as a starting place, I propose that there are three distinct types of symbolic speech cases. First, there are communicative gestures and symbols. Second, there is conduct closely associated with speech such as marching and picketing. Third, and the most nuanced of the three, would be play acting or acts of theater.

A. Communicative Gestures and Symbols

The first category, gestures and symbols, presents the easiest type of case for the Court.[35] Symbols are used everywhere as shorthand references that send messages from mind to mind.[36] We use gestures all the time to communicate

---

33. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (finding movies to be protected speech).

34. The Supreme Court has not addressed whether video games are free speech or not, but commentators say the lower courts are split on the issue. *See* Patrick M. Garry, *Defining Speech in an Entertainment Age: The Case of First Amendment Protection for Video Games*, 57 SMU L. REV. 139, 140 (2004) ("Recently the courts have reversed direction from their earlier decisions in which video games were not seen as protected speech . . . ."); Anthony Ventry III, Comment, *Application of the First Amendment to Violent and Nonviolent Video Games*, 20 GA. ST. U. L. REV. 1129, 1130 (2004) ("Recent federal district and circuit court decisions have been split on the issue of whether video games constitute speech under the First Amendment.").

35. When the Court in *Barnette* used the phrase "mind to mind," the Court was referring to "emblems," and these seem to be the same as symbols. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) ("The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.").

36. Peter Meijes Tiersma mentions a child's pointing, the heart symbol, Morse Code, American Sign Language, and international driving signs as examples of non-verbal conduct that should be as fully protected as pure speech. Peter Meijes Tiersma, *Nonverbal Communication and the Freedom of "Speech"*, 1993 WIS. L. REV. 1525, 1545-46.

to others. In addition to the many hand gestures that might indicate that we are displeased with another's conduct, we also use gestures as indications of approval. A friendly wink in a bar may indicate a desire to get better acquainted. A casual wink in the work place may just be a charming gesture. On the other hand, persistent winking at subordinates in the work place may be viewed as unacceptable sexual harassment.[37] Or a wink may be just a friendly gesture indicating that a person is being let in on a secret joke. "Wink, wink, nudge, nudge," went the Monty Python line, after some patently suggestive statement.[38] Though we may sometimes be unsure of a particular wink's message, we are seldom in doubt about the fact that a person has communicated something to us, and in most settings we are able to use the context to decipher and understand the message.[39]

Pure speech, such as "I *just* love you," is as susceptible of different meanings as is the wink. Still, the inherent ambiguity of the verb "love," being modified by the adverb "just," does not make it any less speech.[40] The wink, though

37. See *Scott v. Sears, Roebuck & Co.*, where the Seventh Circuit analyzed a female employee's working conditions for sexual harassment. 798 F.2d 210 (7th Cir. 1986), *overruled in part by* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993), *as recognized in* Saxon v. Am. Tel. & Tel. Co., 10 F.3d 526 (7th Cir. 1993). The court noted that she was repeatedly propositioned and winked at by her supervisor but found inadequate evidence of a hostile work environment. *Id.* at 211-12; *see also* Wenner v. C.G. Bretting Mfg. Co., 917 F. Supp. 640, 647 (W.D. Wis. 1995) (involving plaintiff who complained of sexual harassment due to smiling and winking by employer's customer's representative, as well as other actions).

38. *Monty Python's Flying Circus: How to Recognise Different Types of Trees From Quite a Long Way Away, Candid Photography Sketch* (BBC television broadcast Oct. 19, 1969). The sketch can be viewed on websites such as YouTube. *See* Monty Python—Nudge Nudge, http://www.youtube.com/watch?v=SrDFGa0juCM (last visited May 22, 2008).

39. Tiersma distinguishes between the wink and a twitch, noting that a wink is "most successful if it occurs only once, setting it apart from the natural process of twitching." Tiersma, *supra* note 36, at 1565-66 & n.152. He also references anthropologist Clifford Geertz as identifying a wink as communication because it is action which is done "(1) deliberately, (2) to someone in particular, (3) to impart a particular message, (4) according to a socially established code, and (5) without cognizance of the rest of the company." *Id.* at 1566 n.152 (citing CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 6 (1973)). Tiersma notes that except for (5), which is unique to winking, the other four provide a useful description of communication, including symbolic speech. *Id.*

40. "I love you" is hard enough to understand, but when additional words are added—"I really, really, really love you"—it seems that the meaning is that I don't really like you that much at all. Additionally, when letters are left out or love is misspelled we compound the mystery of the human language with the enigma of human relations. When an email is signed simply "L" or "l" it means either I love you so much that you will understand that the single letter captures the heartfelt emotion I have for you or it means that I don't think I like you very much at all, but if you were nice to me maybe we could go out. When a letter is signed "luv," it means that I do indeed love you but I'm a little shy about it until you say it first or it means I think you hit on my roommate and I hope you rot in hell. Compare when seafood is

similarly ambiguous, is no less clearly speech. Profane gestures would certainly fall within this category. A number of courts have concluded that the rude use of the middle finger is protected symbolic speech.[41] In this category, in addition to profane gestures, would fall the "V" finger gesture for peace or victory, the OK sign, and the thumbs up, thumbs down gesture.[42] Even the least sophisticated of us probably recognizes that these common Western gestures might indicate something far differently in some other culture.[43] Symbols are essentially the same as gestures, from the ubiquitous circle with the red slash across it telling people not to drink the non-potable water in the stagnant golf course pond that no one would think to drink, to the heart shape letting us know that yet another person loves New York or could not be fonder of her Yorkies.

Flags, when waved or displayed, seem to be this type of common symbol that we recognize as speech, without really thinking about it very much.[44] This speech type would include anything taped to, attached to, printed on, or burned into the flag. Some might argue that respect for the national flag might justify regulating the use of the flag as a symbol,[45] but few would argue that the waving flag is not as much speech as the spoken or written word. These, and

---

misspelled "Krab" which means that it will taste like krap.

41. *See, e.g.*, Corey v. Nassan, No. 05-114, 2006 WL 2773465, at *12 (W.D. Pa. Sept. 25, 2006) (concluding confidently, after a careful look at the precedents, that "[t]he weight of federal authority establishes that directing the middle finger at a police officer is protected expression under the First Amendment"); Nichols v. Chacon, 110 F. Supp. 2d 1099, 1106 (W.D. Ark. 2000) ("As such, [flipping off a police officer] fell squarely within the protective umbrella of the First Amendment and any action to punish or deter such speech—such as stopping or hassling the speaker—is categorically prohibited by the Constitution."); *see also* Brockway v. Shepherd, 942 F. Supp. 1012 (M.D. Pa. 1996) (concluding that flipping off a police officer did not constitute fighting words or obscene language).

42. Kudos to Roger Ebert, famed movie critic of the *Chicago Sun Times* and television's *Siskel and Ebert at the Movies*, for having the prescience to obtain a trademark on the use of the ancient thumbs up, thumbs down symbol—apparently going back to the ancient Romans—for purposes of rating movies. Mark Caro, *Trademark Issue—It's All Thumbs*, CHI. TRIB., Aug. 31, 2007, at C1.

43. My understanding is that two thumbs up would be the same as giving someone the finger in the Middle East and the OK sign the same as giving someone the finger in Brazil. ROGER E. AXTELL, GESTURES: THE DO'S AND TABOOS OF BODY LANGUAGE AROUND THE WORLD 161, 202-03 (1997). I am not sure, but I think that giving someone the finger wherever you travel is pretty much like giving someone the finger in America and should especially be avoided when you are in my blind spot.

44. *Barnette* referred to "an emblem or flag" as synonymous. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

45. For example, in his dissent in *Spence*, Justice Rehnquist states: "Although I agree with the Court that appellant's activity was a form of communication, I do not agree that the First Amendment prohibits the State from restricting this activity in furtherance of other important interests." Spence v. Washington, 418 U.S. 405, 416-17 (1974) (Rehnquist, J., dissenting).

many similar gestures and symbols, are so close to speech that we seldom consider the possibility that they might not be.[46] The burning of the flag, I think, goes beyond the flag itself as a symbol and falls within the acts of theater category of symbolic speech. No wonder that the burning flag presented the Supreme Court with some of its hardest symbolic speech cases.[47]

---

46. Even some uses of the flag that seem to be unrelated to any freedom of expression have been treated as speech. A 1971 federal district court case, *Parker v. Morgan*, nicely illustrates the point. 322 F. Supp. 585 (W.D.N.C. 1971). In *Parker*, two individuals were separately tried for violating North Carolina's law against modifying the American flag. *Id.* at 587. Parker, the first plaintiff, wore a jacket on the back of which he had sewn an American Flag superimposed with the phrase, "Give peace a chance" and a hand with the fingers formed in a "V" shaped peace symbol. *Id.* Berg, the second plaintiff, had affixed a United States flag to the ceiling of his automobile and in the course of doing so had torn it about the edges and then pierced it with fasteners. *Id.* Though both were given protection under the umbrella of free speech by the district court, it is hard to see that both have the same right to claim the privilege. *Id.* at 593. Parker was clearly engaged in free speech, while Berg appeared to be repairing his car ceiling liner. Perhaps, though, the district court was only recognizing that any use of the flag, without regard to actual intent, would presumptively be treated as speech. *Cf.* United States v. Eichman, 496 U.S. 310, 317–18 (1990) (holding that Congress' attempt to pass a content-neutral law protecting the national flag "suppresses expression out of concern for its likely communicative impact. Despite the Act's wider scope, its restriction on expression cannot be 'justified without reference to the content of the regulated speech'").

The Supreme Court itself has been inconsistent in its treatment of the ambiguous use of the flag. In 1970, it dismissed the appeal of a challenge to a California state court's conclusion that making a vest out of an American flag raised no free speech issues. Cowgill v. California, 396 U.S. 371 (1970) (per curiam). In Justice Harlan's concurring opinion he said:

> The record before us is not in my judgment suitable for considering this broad question as it does not adequately flush the narrower and predicate issue of whether there is a recognizable communicative aspect to appellant's conduct which appears to have consisted merely of wearing a vest fashioned out of a cutup American flag.

Id. at 371 (Harlan, J., concurring). Nonetheless, just four years later, the Court assumed that wearing an American flag on the seat of one's pants was protected free speech expression. Smith v. Goguen, 415 U.S. 566, 573 (1974) (striking down a Massachusetts flag misuse statute because the statute's literal scope was "capable of reaching expression sheltered by the First Amendment").

Perhaps this ambiguity is what the Court had in mind when it cautioned in one of its flag burning cases that not everything involving flags was speech. Texas v. Johnson, 491 U.S. 397, 405 (1989) ("We have not automatically concluded, however, that any action taken with respect to our flag is expressive.").

47. Both Supreme Court flag burning cases, *Johnson* and *Eichman*, were 5-4 decisions with heartfelt dissents. *Johnson*, 491 U.S. 397; *Eichman*, 496 U.S. 310. Justice Stevens' dissent in *Eichman* stated:

> Burning a flag is not, of course, equivalent to burning a public building. Assuming that the protester is burning his own flag, it causes no physical harm to other persons or to their property. The impact is purely symbolic, and it is apparent that some thoughtful persons believe that impact, far from depreciating

B. Expressive Conduct Closely Related with Free Speech

The second type of symbolic speech case relates to those activities not in and of themselves speech, but which are so entwined with speech as to be inseparable from it. Common examples of this category recognized by the Court in past cases are marching,[48] picketing,[49] soliciting charitable contributions,[50] selling magazines or other publications,[51] distributing leaflets,[52] and donating money to political causes.[53] Even the freedom of association seems to be not speech itself, but rather an activity so closely connected to speech as to be protected as a corollary of free speech to the same degree as the association's message would be protected.[54] Similarly, the Court has found that

---

> the value of the symbol, will actually enhance its meaning. I most respectfully disagree.

Eichman, 496 U.S. at 323 (Stevens, J., dissenting).

48. Though *Cox v. Louisiana* upheld the free speech claim of marchers in the case because of viewpoint discrimination, it was not a whole-hearted endorsement of symbolic speech. Cox v. Louisiana, 379 U.S. 536 (1965). In the Court's first use of the term "pure speech," Justice Goldberg's opinion cautioned:

> We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.

Id. at 555.

49. In *United States v. Grace*, 461 U.S. 171 (1983), the Court upheld the right to picket near the United States Supreme Court building.

50. *See* Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980) ("Prior authorities, therefore, clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment.").

51. The Court in *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 164 (2002), found invalid a permit requirement before Jehovah's Witnesses plaintiffs could sell their literature.

52. In *Jamison v. Texas*, 318 U.S. 413, 416 (1943), the Court equated "handbills and literature" to the "spoken word."

53. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 21 (1976) (per curiam) (stating that a contribution to a political candidate "serves as a general expression of support for the candidate and his views"). In *Austin v. Michigan State Chamber of Commerce*, the Court was even more direct: "Certainly, the use of funds to support a political candidate is 'speech.'" 494 U.S. 652, 657 (1990).

54. The Court in *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984), summarized its past protection of expressive association as having "recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion," calling it "an indispensable means

newspaper racks were so inseparably connected to the sale of newspapers that any attempt to regulate those infernal coin-stealing dispensers of breakfast reading was subject to the same test as the regulations of the newspapers themselves. In *City of Lakewood v. Plain Dealer Publishing Co.*, the Court found invalid a news rack licensing scheme that gave the mayor content-like authority over news racks.[55] The Court said that such a scheme was unconstitutional if such a system is "applied to speech, or to conduct commonly associated with speech."[56] Content-neutral regulations of news racks received the same intermediate free speech test as the regulation of free speech itself,[57] and content-based regulations received the same strict scrutiny test.[58] There was no claim that news racks constitute examples of symbolic speech, but rather that certain conduct, the dispensing of newspapers and other materials without the need for human interaction, is so closely connected to speech that it is protected as speech.[59] The same seems to be true of picketing and marching.[60]

To say that things such as picketing and marching are closely associated with speech does not seem to be quite the same as *Spence*'s reference to speech "imbued with elements of communication."[61] Symbols and gestures, on the

---

of preserving other individual liberties."

55. 486 U.S. 750, 759 (1988).

56. *Id.* The dissent argued that news racks were not the modern equivalent of newsboys and could be more heavily regulated. *Id.* at 778 n.6 (White, J., dissenting).

57. *Compare* Multimedia Publ'g Co. of S.C. v. Greenville-Spartanburg Airport Dist., 991 F.2d 154 (4th Cir. 1993) (holding total ban on news racks at an airport to be an invalid time, place, and manner regulation of speech), *with* Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 100 F.3d 175 (1st Cir. 1996) (holding ban on news racks in an historic district was a constitutional time, place, and manner regulation). Although reaching different results under the facts, both Circuits applied the applicable content-neutral free speech test to laws regulating news racks.

58. *See City of Lakewood*, 486 U.S. at 759. In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), the Court treated a regulation of commercial speech in news racks exactly like any other commercial speech case, finding no substantial justification for the different treatment of newspapers and other publications sold in news racks.

59. *City of Lakewood*, 486 U.S. at 759.

60. *See* Cmty. for Creative Non-Violence v. Watt, 703 F.2d 586, 623 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd sub nom.* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984). Then-Judge Scalia's dissenting opinion surveyed past symbolic speech cases and concluded: "The marching and picketing holdings represent not conduct protected because it is in itself expressive, but rather what the cases and commentators call 'speech-plus'—conduct 'intertwined' or 'intermingled' *with speech*." *Id.* (footnotes omitted). The Court in *Cox v. Louisiana*, 379 U.S. 559, 563 (1965), had said, "The conduct which is the subject of this statute—picketing and parading—is subject to regulation even though intertwined with expression and association." *See also* United States v. Grace, 461 U.S. 171, 176 (1983).

61. Spence v. Washington, 418 U.S. 405, 409 (1974) (per curiam).

other hand, do seem to be so imbued with communication as to be barely distinguishable from either the written or spoken words. Conduct like marching seems to be protected not because the march itself is communicative, but because marching is an effective way of getting the message noticed and is inseparable from the message. The act of handing out a leaflet is not terribly communicative, but it is a convenient way of transmitting the information on the leaflet to the possession of another person.

Of all of the conduct protected as speech, things closely connected to speech have given the Court little problem, often joining any list of things protected as symbolic speech.[62] These things closely connected to speech are not the same as speech, in that they often threaten other interests that would not be threatened by speech itself. Though closely related to speech, they create problems of litter,[63] road traffic,[64] and side walk congestion[65] that would never be a problem with pure speech. In that sense, they are like destructive activities that we would never treat as speech. Importantly, however, they are different from overtly destructive activities in that we recognize that the incidental harm to other interests are ones that must be tolerated. They are tolerated because of the importance we give to speech in public areas and often by persons who might not have access to more mainstream media.[66] The courts have had little trouble

---

62. See the cases cited in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505–06 (1969), which, in addition to *Barnette* and *Schomberg*, include several cases involving civil rights marching and picketing. Stromberg v. California, 283 U.S. 359 (1969); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

63. The Court in *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939), found concern for litter to be a valid state interest, but not adequate in the case to justify restrictions on persons passing out leaflets:

> Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets.

64. Justice Clark's dissent in *Edwards v. South Carolina*, 372 U.S. 229, 240 (1963) (Clark, J., dissenting), described the student civil rights demonstration as having students so massed that "vehicular and pedestrian traffic was materially impeded." However, the majority did not see the students' arrests as involving legitimate traffic matters: "The circumstances in this case reflect an exercise of these basic constitutional rights in their most pristine and classic form." *Id.* at 235 (majority opinion).

65. The police chief in *Edwards* testified that the students had blocked the sidewalks. *Id.* at 232 n.6.

66. See the widely quoted language in *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939), recognizing the importance of speech in public forums:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for

treating these closely related activities as free speech. If the regulation is content-neutral, then some intermediate test is applied with the free speech interest generally having some substantial weight.[67] If the regulation is content-based, then the court imposes such a strict test, often the compelling state interest test, that there is little chance that the law will be upheld.[68] Generally in these types of cases, the Court spends virtually no time contemplating whether speech is involved, but just determines which free speech test is the correct one, intermediate or strict, and then applies that test.[69] These cases are

---

> purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

67. Although *Perry Educucation Ass'n v. Perry Local Educators' Ass'n* did not itself involve this point, it nicely summarizes prior cases: "The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." 460 U.S. 37, 45 (1983).

68. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 321 (1988) ("Our cases indicate that as a *content-based* restriction on *political speech* in a *public forum*, [this law] must be subjected to the most exacting scrutiny. Thus, we have required the State to show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" (quoting *Perry*, 460 U.S. at 45)). In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986), the Court stated: "This Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment." Chief Justice Rehnquist in dissent in *Bartnicki v. Vopper*, 532 U.S. 514, 548 (2001) (Rehnquist, C.J., dissenting), objected to applying "the often fatal standard of strict scrutiny." In one interesting empirical study, Adam Winkler concluded that the application of strict scrutiny in free speech cases in federal courts resulted in the underlying legislation surviving *only* 22% of the time. Adam Winkler, *Fatal in Theory and Strict in Fact: An Emperical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 815 (2006). *Burson v. Freeman*, 504 U.S. 191 (1992), is just that type of unusual content-based case in that the Court found that a law restricting election campaigning within 100 feet of a polling booth did pass the compelling state interest test. Nonetheless, the Court, citing *Perry*, gave a pretty standard version of the test: "As a facially content-based restriction on political speech in a public forum, [the law] must be subjected to exacting scrutiny: The State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Id.* at 198.

69. See, for example, *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), where the law banned picketing within 150 feet of a public school except related to a labor dispute. The Court did not discuss at all whether picketing was speech. The Court said only that "picketing plainly involves expressive conduct within the protection of the First Amendment." *Id.* at 99. The Court found that the law was a content-based regulation of speech. *Id*. Earlier, using both equal protection and free speech analysis, the Court had said, "But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 95. Additionally, in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the Court upheld a content-neutral regulation of noise near a public school. Again, though there is extensive discussion of the level of review, the Court

not terribly helpful in other symbolic conduct cases; they are too limited in the type of activity involved and too well established to tell us very much about whether a burning draft card or a shanty town is also speech.[70] Perhaps they do tell us one thing: conduct which enhances the free speech message can be accorded the same protection as pure speech, even where such conduct threatens other interests to a greater degree than if it were only pure speech.

C. Play Acting and Acts of Theater

The third type of symbolic speech cases are those involve play acting or theater pieces—usually street theater. Burning a draft card in a public place during the Vietnam War had no point other than to create a theater piece to dramatically call attention to one's opposition to that war.[71] Burning a flag in a public place is nothing short of play acting, pretending that one is so upset at the evils of the government that only the cathartic act of ritualistic destruction by fire can communicate the depth of despair. There is no pretense that the act has any utilitarian purpose, such as that American flags are being imported from China with such wild proliferation that only street burnings will prevent them from interfering with world-wide commerce or that the price of natural gas has so far outstripped the ability of the poor to keep themselves warm, that the burning of flags carefully piled on top of dry twigs and kindling is an act of survival.[72] The tent city across from the White House in *Clark* was nothing but theater, with the piece's directors thinking it had better dynamics if sleeping was allowed.[73] On the other hand, the symbolic speech cases involving bare

---

said almost nothing about whether picketing was speech. The Court only referred somewhat obliquely to "the classic expressive gesture of the solitary picket." *Id*. at 119.

70. *See, e.g.*, Univ. of Utah Students Against Apartheid v. Peterson, 649 F. Supp. 1200 (D. Utah 1986).

71. For those of a certain age, it is easy to recall the tensions of the time that made the simple act of burning a draft card a dramatic act of defiance. In 1970, as a young U.S. Justice Department antitrust attorney, I had the temerity to post a handmade "PEACE" sign on my thirteenth floor window of the U.S. Courthouse in downtown Los Angeles overlooking the city Hall of Justice. For my troubles, I had my office invaded by federal officials with guns drawn and the sign torn down and shredded. Apparently, I had violated a law against the posting of bulletins on a federal building.

72. Indeed, Tiersma argues that nonfunctionality is one of the hallmarks of symbolic speech, such as a shopkeeper waving a knife at looters instead of using the knife for its natural function to cut things. Tiersma, *supra* note 36, at 1567.

73. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 292 (1984). The Community for Creative Non-Violence (CCNV) was allowed to set up forty tents on the Capital Mall, but "[t]he Park Service . . . specifically denied CCNV's request that demonstrators be permitted to sleep in the symbolic tents." *Id.* Justice Marshal observed,

> The primary purpose for making *sleep* an integral part of the demonstration was "to re-enact the central reality of homelessness," and to impress upon public

breasted dancers and leering customers[74] seem to involve something less than theater, as opposed to the group nude scene at the end of the first half in the production of Hair which was pure theater and quaintly innocent.[75]

What distinguishes theater pieces from more wanton behavior involving high levels of violence, destruction, or perhaps even high levels of inconvenience[76] is not the expressiveness. It is the distance from things traditionally thought to involve communication, the overriding public interest in protecting public safety, and perhaps the unspoken desire to protect our commitment to open expression by not equating it to acts of which we would never approve. Violent acts, though not protected as speech, may be intended to convey a message every bit as clearly as the best of theater pieces, and the public is every bit as likely to understand the message. Few of us fail to understand the message being sent by another suicide bomber in some crowded café in some distant land, but we can only shake our heads at such wanton disregard for innocent

---

> consciousness, in as dramatic a way as possible, that homelessness is a widespread problem, often ignored, that confronts its victims with life-threatening deprivations.

Id. at 303-04 (Marshall, J., dissenting) (citation omitted).

74. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

75. The topless dancing in *Barnes* and *Pap's A.M.*, as the Court itself seemed to want to recognize, had little symbolic speech content. Instead the Court, perhaps to distinguish it from *Hair*-like cases, found the nudity marginally within the periphery of speech and then promptly allowed the most de minimis of state interests to justify restricting it. City of Erie v. Pap's A.M., 529 U.S. 277, 289-90 (2000); *Barnes*, 501 U.S. at 565-71. The cases did no favors for those wanting either an expansive view of expressive conduct or a high level of protection for speech. Justice White's dissenting opinion for four of the justices in *Barnes* took a more expansive view of the free speech value of topless dancing:

> [W]hile the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who . . . wants some 'entertainment' with his beer or shot of rye.

Barnes, 501 U.S. at 594 (White, J., dissenting) (quoting Salem Inn, Inc. v. Frank, 501 F.2d 18, 21 n.3 (2d Cir. 1974)) (alteration and omission in original).

76. In *United States v. Brock*, 863 F. Supp. 851, 855-56 (E.D. Wis. 1994), *aff'd sub nom.* United States v. Soderna, 82 F.3d 1370 (7th Cir. 1996), the Freedom of Access to Clinic Entrances Act of 1994 (FACE), which made it a federal crime to block the entrance to an abortion clinic, was violated by two cars parked in front of the two entrances. The court seemed to support the government's argument that forcibly blocking entrances was no more protected speech than violent activity. *See id.* at 858-59. Nonetheless, the court believed that the language of the FACE law might reach more traditional free speech activity such as marching and picketing. *Id.* at 859. Applying *O'Brien*, the court upheld the law. *Id.* at 865 & n.27, 870; *accord* City of Cincinnati v. Thompson, 643 N.E.2d 1157 (Ohio Ct. App. 1994) (per curiam) (finding trespass on premises of a medical facility in protest of abortions to be symbolic speech, but unprotected speech).

life. Unlike theater where the guns and the blood are pretend, we deny destructive acts protection as speech because real violence does not belong in acts of theater.[77] What is most amazing about theater as speech is that few of us would have any difficulty in drawing the line between it and even the most expressive violent acts. No matter how much we understand the intended message, we will never treat the bomb-filled Ryder truck in front of a child care center as worthy of protection as speech.[78] Ideas may blow up the world as we know it, but we protect to our deaths those ideas. Actually blowing up the world we know, for whatever idea, is so foreign to what we consider protected as speech that we repudiate it. That is a line anyone of us can draw in the blood.[79]

The hardest line to draw is between theater pieces that should be accorded full speech protection and acts of peaceful civil disobedience that are not protected as free speech. *O'Brien* is perhaps the most famous case that raised that issue. O'Brien burned his draft card knowing that it was illegal.[80] Even if convicted and sentenced to jail for that crime, for the most part he would have achieved his free speech purpose. Though in jail, his idea that he thinks the Vietnam War is so wrong that he is willing to go to jail so that others will know the sincerity of his beliefs, is running free in the marketplace of ideas. Indeed, but for it being illegal to burn his draft card, much of the force of his protest would have been lost.[81] One cannot imagine that his perfectly legal public burning of a sign with "WAR" on it would have made the evening news—or

77. And if any act of theater actually included real violence, such as the snuff films of urban fiction, it would forfeit any protection it had as speech.

78. *See* Douglas O. Linder, The Oklahoma City Bombing & The Trial of Timothy McVeigh, http://www.law.umkc.edu/faculty/projects/ftrials/mcveigh/mcveighaccount.html (last visited May 22, 2008).

79. See *United States v. Miller*, 367 F.2d 72, 79 (2d Cir. 1966), where the court observed, "The range of symbolic conduct intended to express disapproval is broad; it can extend from a thumbs-down gesture to political assassination. Would anyone seriously contend that the First Amendment protects the latter?" For support, the court cited the brilliantly understated Professor Kalven. *Id*. at 79 n.12 ("Political assassination is a gesture of protest, too, but no one is disposed to work up any First Amendment enthusiasm for it." (quoting HARRY KALVEN, THE NEGRO AND THE FIRST AMENDMENT 133 (1965))).

80. United States v. O'Brien, 391 U.S. 367, 369 (1968) ("After he was advised of his right to counsel and to silence, O'Brien stated to FBI agents that he had burned his registration certificate because of his beliefs, knowing that he was violating federal law.").

81. *Id*. at 370 ("He stated in argument to the jury that he burned the certificate publicly to influence others to adopt his antiwar beliefs, as he put it, 'so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position.'"). I recall Dick Cavett, one of our early talk show hosts, saying that he was only mildly rebellious; he boiled his draft card.

indeed the burning of his driver's license.[82] For him to argue that the burning of his draft card was not only legal, but indeed was entitled to the high level of protection that we reserve for our cherished free speech rights is a bit disingenuous.[83] One might think that he should not be allowed to have it both ways; to get all the attention because he is publicly breaking the law, yet then claim that he is not deserving of attention because what he is doing is as protected as chanting in a crowd, "War is hell." If the crowd was large enough and loud enough, and if it was a slow news day, perhaps his face and voice would have been part of a crowd shot on the evening news. Nevertheless, O'Brien's unique anxiety would have been lost.

Still, it is easy to think of O'Brien's act of civil disobedience as being fully protected free speech, not being a crime at any level. Although the Court was only willing to assume that it was speech before holding that, even if speech, it was not protected,[84] the sheer communicative nature of his symbolic act and the absence of little, if any, harm to legitimate governmental interest makes us want to view O'Brien's act as speech. The Court's logic, that his speech was a harmful violation of Selective Service regulations,[85] if true, should make us view his act as civil disobedience subject to punishment, not speech at all. Nonetheless, it is the lingering doubt that the act in fact violated any legitimate Selective Service rules that makes it easier to believe that he was engaged in symbolic speech. In fact, despite the Court's rejection of the argument, it is tempting to believe that the law was passed only for the purpose of suppressing such speech, not out of any real Selective Service concerns.[86] If O'Brien had

---

82. *See* John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1489-90 (1975) ("Had there been no law prohibiting draft card burning (or requiring the continued possession of one's draft card), he might have attracted no more attention than he would have by swallowing a goldfish.").

83. There might be a different issue if O'Brien had been burning the card to point out that an illegal law banning the burning of draft cards had been passed. In that instance, his intent perhaps would not have been civil disobedience, but public notification that an illegal law had been passed chilling free speech rights.

84. *O'Brien*, 391 U.S. at 376 ("However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity.").

85. *Id.* at 380 ("The many functions performed by Selective Service certificates establish beyond doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and wilfully destroy or mutilate them.").

86. *See id*. at 387. The Court itself, in an appendix to its opinion, quoted what seems damning evidence from portions of the Senate Armed Services Committee Report on the bill: "The committee has taken notice of the defiant destruction and mutilation of draft cards by

simply lay limp across the door to a draft registration station, then been carried off and charged with criminal trespass, his symbolic act of protest would have been as clearly expressive, but likely not protected as speech because it was far more clearly unprotected civil disobedience.[87] Although we have long regarded our sidewalks, streets, and public parks as protected sites for free speech, we nonetheless have little difficulty in criminalizing the blocking of sidewalks, the disturbing of traffic, or overnight sleeping in public parks and distinguish that from legitimate marching and picketing.[88] The fact that a person is communicating a message through their violation of the law does not immunize them from punishment.[89] That is the price they pay for gaining our attention; attention they would not have had but for the illegal act.

On the other hand, the fact that a person may have violated a law for expressive purposes should not lead to a higher penalty than simply for the law violation itself. Again, *O'Brien* is illustrative. The Court upheld his six year sentence of federal supervision as treatment for his law violation, and this after it had assumed that he was engaged in free speech.[90] If he had not been engaged in speech at all, it is hard to believe that he would have received such a sentence.[91] In fact, O'Brien was not burning the card to avoid his draft responsibility.[92] Had he burned his card as kindling to start a small fire to roast marshmallows on the Washington, D.C. mall, his crime would have been the same, but it is hard to imagine that his sentence would have been as severe. Even though civil disobedience to make a point may not justify total immunity

---

dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies." *Id*. (quoting S. REP. NO. 89-589, at 2 (1965)) (internal quotation marks omitted).

87. *Cf.* Cox v. Louisiana, 379 U.S. 536, 555 (1965) ("A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations.").

88. *See supra* note 49 and accompanying text.

89. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence. Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of 'advocacy.'" (quoting Samuels v. Mackell, 401 U.S. 66, 75 (1971) (Douglas, J., concurring) (internal quotation marks omitted))).

90. *O'Brien*, 391 U.S. at 370 n.2, 386.

91. Tiersma points out that those persons who burned their draft card were subject to the same penalty as those convicted of the more serious crime of evading the draft. Tiersma, *supra* note 36, at 1587 n.214.

92. *See O'Brien*, 391 U.S. at 369. At least according to his statement to the FBI, "he had burned his registration certificate because of his beliefs, knowing that he was violating federal law." *Id*.

as free speech, surely free speech means that the person's message cannot be used to justify a harsher sentence for their illegal act.[93]

The line between theater pieces that should be protected as speech and civil disobedience that, however expressive, can be punished as conduct is harder to draw than the line between theater pieces and unprotected violence.[94] Notwithstanding that difficulty, we should have no trouble in seeing that a law banning the unauthorized wearing of a U.S. military member's uniform should have no application to a street performer's wearing of the uniform to act out a vignette protesting the Vietnam War.[95] A federal anti-counterfeiting law against photographing U.S. currency should not preclude a magazine photo of real money to add verisimilitude to a scene emphasizing the life changing nature of having lots of money.[96] I would submit that O'Brien's draft card burning is the same type of symbolic act and protected as free speech, easily separable from any legitimate concern the law might have had for persons actively concealing their draft status.

Parking immobilized cars directly in front of entrances to abortion clinics is, I think, just as clearly on the other side of the line. The act is no doubt expressive about the moral objection to abortion, but it is also an act of civil disobedience so obviously destructive of others' rights as to deserve criminal penalties.[97] On the other hand, wearing a mask as part of the symbolic costume

---

93. *See, e.g.*, Tiersma, *supra* note 36, at 1588 ("When someone is not just flouting a law, but is concurrently expressing opposition to it, the state can punish the violator as it would any other. But the fact that the conduct involves communication should invoke the First Amendment, which in this case should require that a court scrutinize the punishment to ensure that the defendant is not being dealt with more severely because of her speech." (citing THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 87 (1970))).

94. Henkin attempted to make this distinction:

> Every act of civil disobedience is usually also a communication, a protest, but the communication is incidental to its principal aim—to flout the law or the government, accept punishment, and by that degree of martyrdom or by the act's effect in clogging the administration of the law or the conduct of government, to discredit the law or government policy, render it unworkable, or achieve its abolition.

Henkin, *supra* note 10, at 82.

95. In *Schacht v. United States*, the federal law actually had an exception for "theatrical . . . production," but only "if the portrayal [did] not tend to discredit that armed force." 398 U.S. 58, 59-60 (1970). Despite the government's arguments to the contrary, the Court found that a street skit was such a production, and that the limitation to positive portrayals of the military was an invalid content-based restriction. *Id.* at 63.

96. Regan v. Time, Inc., 468 U.S. 641 (1984) (protecting a Sports Illustrated cover with a picture of real money in a basketball hoop).

97. Largely because of the overbreadth of the law, the lower court treated this action as speech, but—applying the *O'Brien* test—as unprotected speech. United States v. Brock, 863 F. Supp. 851, 858 (E.D. Wis. 1994).

of the Klu Klux Klan seems like theater, not a real attempt to hide one's identity for committing crime.[98] While the state might legitimately be concerned about mask-wearing criminals, it does not have a similar interest in preventing even a committed racist from playing dress up. Additionally, a factual enquiry into whether the mask is or is not detachable, as one lower court did in such a case, seems wholly unnecessary.[99] The law simply should not have any application to pretend activities that do not threaten any competing governmental interest.

III. The Level of Protection Given to Symbolic Speech

This article's main subject is the difficult line drawing between expressive conduct found to be symbolic speech and that found to be merely conduct. Still, a brief summary of the normal free speech tests is necessary to rebut the claim that the government may more easily regulate symbolic speech than pure speech.[100] The Court in *Johnson* stated: "The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word."[101] This often quoted statement[102] applies only to content-neutral

---

98. *See* Hernandez v. Superintendent, Fredericksburg-Rappahannock Joint Sec. Ctr., 800 F. Supp. 1344 (E.D. Va. 1992) (finding a detachable Ku Klux Klan mask not to be symbolic speech).

99. *Id.* at 1352.

100. Like all free speech forms, symbolic speech is subject to government regulation. Whether the illustration is Justice Holmes's old saw, that one cannot falsely shout fire in a crowded theater, Schenck v. United States, 249 U.S. 47, 52 (1919), or Steve Martin's clever query as to whether one can shout movie in a crowded fire house, STEVE MARTIN, A WILD AND CRAZY GUY (Warner Bros. 1978), saying that something is speech does not mean that it is absolutely protected. *See* Virginia v. Black, 538 U.S. 343, 358 (2003) ("The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution.").

101. Texas v. Johnson, 491 U.S. 397, 406 (1989). The *Johnson* language is not entirely to blame however. The Court in *Cox v. Louisiana*, 379 U.S. 536 (1965), had much earlier rejected the claim that marching and picketing as symbolic speech was entitled to the same protection as "pure speech." *Id.* at 555.

102. *See Johnson*, 491 U.S. at 406. Among the cases citing *Johnson* for this proposition are *R.A.V. v. City of St. Paul*, 505 U.S. 377, 429 (1992); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 578 (1991) (Scalia, J., concurring); and *City of Erie v. Pap's A.M.*, 529 U.S. 277, 299 (2000). There are also a number of lower court opinions that quote the *Johnson* language. Especially important may be *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000), where, in a case involving the free speech aspects of charitable contributions to organizations supporting terrorists, Judge Kozinski goes beyond *Johnson*. In adding his own point of emphasis, Judge Kozinski says, "While the First Amendment protects the expressive component of seeking and donating funds, expressive *conduct* receives significantly less protection than pure speech." *Id.* at 1134-35. Judge Kozinski's spin is used without attribution in *United States v. Assi*, 414 F. Supp. 2d 707, 714 (E.D. Mich. 2006). *See also* Young v. N.Y. City Transit

regulations of speech, not content-based regulations.[103] Content-neutral regulations of speech must be justified by some intermediate test, either the *O'Brien* test[104] or some version of the time, place, and manner test.[105] The Court in *Johnson* explicitly disapproved of any content-based regulation of symbolic speech. *Johnson*'s statement that the government had a "freer hand" in regulating symbolic speech than pure speech was immediately followed with this caution: "It may not, however, proscribe particular conduct *because* it has expressive elements."[106] The Court in *Pap's A.M.* quoted the *Johnson* language,

---

Auth., 903 F.2d 146, 153-54 (2d Cir. 1990) (treating public begging as speech, but applying the *O'Brien* test to find the state ban on it valid); *Hernandez*, 800 F. Supp. at 1350-51 (finding a detachable Ku Klux Klan mask not symbolic speech).

103. Content-based regulations of speech are subject to strict scrutiny and must be justified by some compelling state interest or similar test. There are a number of content-based free speech tests that the Court uses and all of them seem to require a version of strict scrutiny. The incitement test of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), protects all but the most extreme variety of radical political speech. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny protect defamation of public officials and public figures except for the most blatant of falsehoods. *Miller v. California*, 413 U.S. 15 (1973), protects all but the least redeeming of sexually explicit speech. Further, in cases such as *City of Houston v. Hill*, 482 U.S. 451, 462 (1987), in applying the "fighting words" exception to free speech of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), a high level of protection is given to disgusting public displays of uncouth language absent the narrowest of circumstances. In other instances not involving categories of speech such as the above, in which the Court has worked out some more specific test, the Court's fallback test for protecting against content-based regulations of free speech is usually the compelling state interest test. *See, e.g.*, Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 540 (1980) ("Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest."); *see also* Boos v. Barry, 485 U.S. 312, 321 (1988) (finding part of a District of Columbia law that banned signs expressing public odium or disrepute of a foreign embassy from being displayed near the foreign embassy to be a content-based law and concluding that it could not be justified by any compelling state interest).

104. See, for example, *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 661-62 (1994), which cites both one of the most widely used time, place, and manner cases, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and *United States v. O'Brien*, 391 U.S. 367 (1968), as being intermediate tests.

105. In *Boos*, one part of the law, as construed by the lower court, limited the right to congregate at a foreign embassy if "the police reasonably believe that a threat to the security or peace of the embassy is present." *Boos*, 485 U.S. at 330. The Court viewed this to be a legitimate time, place, and manner regulation. *Id.* at 333.

106. *Johnson*, 491 U.S. at 406. The Court next quoted then-Judge Scalia's dissenting opinion in *Community for Creative Non-Violence v. Watt*: "[W]hat might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription." *Johnson*, 491 U.S. at 406 (quoting Cmty. for Creative Non-Violence v. Watt, 703 F.2d 586, 622-23 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd sub nom.* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288

but with an important caveat: "As we have said, *so long as the regulation is unrelated to the suppression of expression*, '[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.'"[107] Accepting the *Pap's A.M.* gloss as an accurate summary of *Johnson*, the claim that the government has a "freer hand" to regulate symbolic speech was directed to only the content-neutral intermediate test.[108] If something is speech, then the level of protection will depend on whether the law is content-based or content-neutral, not the speech itself and not whether it is pure speech or symbolic speech.[109]

Even with regard to content-neutral regulations of symbolic speech, the *Johnson* claim that courts have a "freer hand" in regulating symbolic speech was in error. Common examples of content-neutral laws are regulations aimed at the non-speech aspects of the time, place, and manner uses of our public forums, such as concern for traffic,[110] litter,[111] or noise.[112] The only difference

---

(1984)) (alteration in original). Later on, the Court summarized by saying that any difference between pure speech and symbolic speech was "of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression." *Id.* at 416.

107. *Pap's A.M.*, 529 U.S. at 299 (quoting *Johnson*, 491 U.S. at 406) (emphasis added) (alteration in original).

108. The Court in *Johnson* said, "It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid." 491 U.S. at 406-07. This seems to refer to the intermediate test and the inherent weighing of interest necessary to such an approach.

109. The logic for the stricter test for content-based laws is that content preference is more likely to skew and taint the overall marketplace of ideas. In regulating content, the government has placed its thumb on the scale to tilt the balance in favor of some message or some speaker over others. In *United States v. Carolene Products Co.*, the Court emphasized that most substantive interests can be regulated by the government if the law is rationally related to some legitimate governmental interest. 304 U.S. 144, 152 (1938). Any solution to unnecessary government regulations should be left to the political processes. *See id.* at 154. However, in its famous footnote number 4, the Court identified free speech cases where the government is restraining the dissemination of information as one type of case where stricter court review would be called for. *Id.* at 152 n.4. The Court reasoned that laws limiting speech would taint the political process, thus necessitating greater judicial oversight. *Id.*

110. In *Cox v. Louisiana*, the Court, in a list of things not protected as free speech, said, "Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly." 379 U.S. 536, 554 (1965).

111. In *Schneider v. New Jersey*, 308 U.S. 147 (1939), the Court invalidated a ban on handbill distribution on public streets, notwithstanding the government's substantial interest in litter. The Court suggested that prosecuting the person who dropped the handbill was a better alternative. *Id.* at 162. *But see* Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984) ("In contrast to *Schneider*, therefore, the application of the ordinance [banning on the posting of handbills on telephone poles] in this case responds precisely to the substantive problem which legitimately concerns the City. The ordinance

that should exist between the test for symbolic speech and pure speech should relate to any difference in state interests raised by the symbolic aspects to the speech. Importantly, symbolic speech may involve a greater or lesser threat to competing state interest than pure speech. The intermediate test, whether the time, place, and manner or the *O'Brien* version, requires a careful consideration of competing interests through an ad hoc balancing[113] of the harm done to speech as weighed against the importance of the government's nonspeech interest. To the degree that the conduct part of symbolic speech affects different state interest than pure speech, the outcome of the test may be different. For example, in *O'Brien*, burning a draft card during the hot dry season might implicate the government interest to prevent fires, a concern separate and independent of the Selective Service concerns.[114] Similarly, marching creates concern for traffic, and passing out leaflets raises concerns for litter.[115] In other instances, symbolic speech threatens non-speech governmental interest less than pure speech. In *Tinker v. Des Moines Independent Community School District*, children wearing black arm bands at a public school in protest of the Vietnam War constituted less of a threat to the state's substantial interest in classroom order than some pure speech would have, such as students chanting in the back row about the hellishness of war.[116]

---

curtails no more speech than is necessary to accomplish its purpose.").

112. In *Kovacs v. Cooper*, 336 U.S. 77 (1949), the Court found that the governmental interest in prohibiting loud and raucous sound trucks was substantial.

113. By ad hoc balancing, I mean to refer to the Court's careful weighing of competing factors—here the importance of speech vs. the government's concern for nonspeech related interests. Ashutosh Bhagwat also calls this ad hoc balancing, claiming, "Regulations that the Court deems 'content-neutral,' on the other hand, are subject to the *Ward/O'Brien* balancing test, an intermediate form of scrutiny. The *Ward/O'Brien* approach is essentially an *ad hoc* balancing test." Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 305 (1997) (footnote omitted). His description of the process, though, seems much less than the practical weighing of competing factors which I mean by ad hoc balancing: "As a result, in the context of *ad hoc* balancing courts must defer to legislative and executive judgments regarding the need for, and importance of, a particular action; any other approach would constitute untethered, and unjustifiable, judicial second-guessing of democratic judgments." *Id.* at 354.

114. *Cf.* Ely, *supra* note 82, at 1498 n.63 ("*Tinker* would have been a quite different case had it arisen, for example, in the context of a school regulation banning armbands in woodworking class along with all other sartorial embellishments liable to become safety hazards.").

115. *See Cox*, 379 U.S. 536; *Schneider*, 308 U.S. 147.

116. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) ("They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression."); *see also* Grayned v. City of Rockford, 408 U.S. 104 (1972) (allowing the content-neutral regulation of a demonstration that was noisy, and thus disruptive

In *Brown v. Louisiana*, standing silent in protest of a racially segregated public library was not only more eloquent than pure speech, it was also less disruptive of the peace and quiet desired in a library than actual speech would have been.[117] These cases illustrate that the conduct aspect of symbolic speech may weigh differently than pure speech as part of any intermediate test, but that conduct may either be less or more threatening of conflicting state interests. Symbolic speech can be treated differently only to the degree necessary to address any nonspeech interest, not to punish its content or its effectiveness. Thus, courts have a freer hand in restricting symbolic speech that is more threatening of competing state nonspeech interest, but less of a free hand when the symbolic speech is less threatening to the state interest.

The *Johnson* misstatement of the level of protection of symbolic speech seems a direct result of the ill-conceived *O'Brien* test for symbolic speech, which *Johnson* cites as support for its broad proposition.[118] *O'Brien* stated a test for when "'speech' and 'nonspeech' elements are combined," which suggests a different test for pure speech than symbolic speech and contributes to the false notion that symbolic speech is entitled to less protection than pure speech.[119] It seems more likely that *O'Brien* just stated the now common line between content-based and content-neutral regulations of the time, place, and manner of speech.[120] After acknowledging the range of free speech tests used

---

of the school atmosphere).

117. Brown v. Louisiana, 383 U.S. 131, 142 (1966) (reversing a breach of peace conviction and stating that rights of freedom of speech "are not confined to verbal expression").

118. *Johnson* cites *United States v. O'Brien*, 391 U.S. 367 (1968); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); and *City of Dallas v. Stanglin*, 490 U.S. 19 (1989), as support for the proposition that the government has "a freer hand" in regulating symbolic speech, but in truth only *O'Brien* supports the statement. *Texas v. Johnson*, 491 U.S. 397, 406 (1989). It is hard to see that either the holding of *Stanglin*, that teenage social dancing was not symbolic speech, or any of its language supports the claim. *See Stanglin*, 490 U.S. at 25. *Clark*, on the other hand, seems to state just the normal test for free speech, not some different test for symbolic speech. *See Clark*, 468 U.S. at 293.

119. *O'Brien*, 391 U.S. at 376. The *O'Brien* Court does not cite any authority for this claim, but it seems a simple enough reference to the Court's earlier time, place, and manner cases, such as *Cox*, 379 U.S. 536. *See supra* note 13.

120. The Court said as much in *Clark*, where the Court referred to "the four-factor standard of *United States v. O'Brien* for validating a regulation of expressive conduct, which, in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions." 468 U.S. at 298 (citation omitted).

Although the concept of time, place, and manner regulation of speech predates *O'Brien*, such as *Cox* in 1965, 379 U.S. at 558, almost all of the major cases are afterwards. In 1972, *Mosely* and *Grayned*, two of the earliest cases to illustrate the line between content-neutral and content-based regulations were decided. Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); Grayned v. City of Rockford, 408 U.S. 104 (1972). *Clark*, 468 U.S. 288, was decided in 1984. Another major case, *Members of the City Council of Los Angeles v. Taxpayers for*

by the Supreme Court from "compelling; substantial; subordinating; paramount; cogent; [and] strong,"[121] the Court then stated what becomes the famous *O'Brien* test:

> Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified[122] . . . if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[123]

O'Brien awkwardly imposes, in the middle of stating a fairly straight forward intermediate test,[124] the caveat that its intermediate test would be

---

Vincent, was decided in 1984. 466 U.S. 789 (1984). *Ward*, one of the most commonly cited cases, was decided in 1989. Ward v. Rock Against Racism, 491 U.S. 781 (1989).

121. *O'Brien*, 391 U.S. at 376-77 (footnotes omitted).

122. At the ellipsis, I have deleted the first part of *O'Brien* test, "if it is within the constitutional power of the Government." *Id*. at 377. Although sometimes stated as part of the free speech test of *O'Brien*, this requirement is actually only a reference to the fact that federal laws must fall within some enumerated power; the selective service rules in *O'Brien* easily fall within war powers and the power to regulate the armed forces. *Id*. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), where Chief Justice Rehnquist mistakenly applied the first part of *O'Brien* as a free speech test in a state case unrelated to the concept of enumerated powers. *Id*. at 567–68. After noting that it was impossible to determine "exactly what governmental interest the Indiana legislators had in mind," he said that such laws protecting public morality and social order were of ancient origin and currently existed in at least forty-seven states, and were thus within governmental power. *Id*. Justice O'Connor also mistakenly applied this part of the test in *Pap's A.M.*, another state law case. City of Erie v. Pap's A.M., 529 U.S. 277, 296-97 (2000).

123. *O'Brien*, 391 U.S. at 377.

124. A clearer version of the *O'Brien* intermediate test would be, "if the governmental interest is unrelated to the suppression of free expression," then "a government regulation is sufficiently justified . . . if it furthers an important or substantial governmental interest . . . and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id*. Reordering the *O'Brien* test as the Court did in *Pap's A.M.* also improves it immeasurably:

> To determine what level of scrutiny applies to the ordinance at issue here, we must decide "whether the State's regulation is related to the suppression of expression." If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the "less stringent" standard from *O'Brien* for evaluating restrictions on symbolic speech. If the governmental interest is related to the content of the expression, however, then the regulation falls outside the scope of the *O'Brien* test and must be justified under a more demanding standard.

Pap's A.M., 529 U.S. at 289 (quoting Texas v. Johnson, 491 U.S. 397, 403 (1989)) (citations omitted). The Court followed roughly the same approach as the Court in *Johnson*, 491 U.S. at

appropriate only if the law was "unrelated to the suppression of free expression."[125] Though *O'Brien* does not continue the thought, laws passed for the purpose of suppressing free expression would apparently require the strict scrutiny compelling state interest test or its equivalent.[126]

Compare *O'Brien* with *Clark*, which specifically said that it was applying a time, place, and manner test: "We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[127] Other than the use of the modifier "significant" rather than the seemingly synonymous "important or substantial,"[128] and the reference to alternative channels for communication,[129]

403, in reordering the *O'Brien* test. Also see *Blau v. Fort Thomas Public School District*, 401 F.3d 381 (6th Cir. 2005), where the Sixth Circuit reworked the *O'Brien* test as follows: "Under the traditional test for assessing restrictions on expressive conduct, a regulation will be upheld if (1) it is unrelated to the suppression of expression, (2) it 'furthers an important or substantial government interest,' and (3) it 'does not burden substantially more speech than necessary to further [the] interest[].'" *Id.* at 391 (quoting Turner Broad. Sys. v. FCC, 520 U.S. 180, 189 (1997); *O'Brien*, 391 U.S at 377) (citations omitted) (alterations in original).

125. *O'Brien*, 391 U.S. at 377.

126. *See* Ely, *supra* note 82, at 1484 ("The fact that a regulation [is related to the suppression free expression] does not necessarily mean that it is unconstitutional. It means 'only' that the case is switched onto another track . . . which is in fact substantially more demanding . . . .").

127. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

128. The most common requirement in the time, place, and manner cases is that the governmental interest be significant. Typical is *Frisby v. Schultz*, 487 U.S. 474 (1988), where the Court upheld a content-neutral ban on residential picketing focused on particular private homes. The Court said, "Accordingly, we turn to consider whether the ordinance is 'narrowly tailored to serve a significant government interest' and whether it 'leave[s] open ample alternative channels of communication.'" *Id.* at 482 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)) (alteration in original). The Court in *O'Brien* required that the governmental interest be substantial or important, which appear to be similar standards. *O'Brien*, 391 U.S. at 376-77. The Court seems to use the terms "important," "substantial," and "significant" interchangeably in applying the intermediate test, as contrasted with the more consistent use by the Court of the compelling state interest requirement in imposing strict scrutiny. See the intermediate test for gender-based classifications as found in *Craig v. Boren*, 429 U.S. 190 (1976), which framed this version of a middle tier or intermediate test: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197.

129. Consideration of alternative channels of speech is a factor specifically singled out as part of the time, place, and manner test long after *O'Brien* and is not inconsistent with the *O'Brien* approach. *See, e.g.*, Vlasak v. Super. Ct. of Cal. *ex rel.* County of Los Angeles, 329 F.3d 683 (9th Cir. 2003). *Vlasak* involved a city law banning large pieces of wood in any public demonstration, even when the demonstration involved an objection to large pieces of wood

there is no real difference between the *O'Brien* and *Clark* tests. Because even such content-neutral laws may impact important free speech interests,[130] the courts should be careful in weighing the non-speech interest versus the harm to free speech, requiring that the governmental interest be significant, substantial, or important.[131] In applying this test, the Court requires that the law be narrowly tailored, hurting no more speech than necessary.[132] The *O'Brien* Court seemed to be making the same point when it said that "incidental restriction on alleged First Amendment freedoms" should be "no greater than is essential to the furtherance of that interest."[133] Any special threat to governmental interest by the conduct aspects of symbolic speech can be

---

being used to train elephants. *Id*. at 686. The case mentions the importance of alternative forms of communication in the *O'Brien* balancing test. *Id.* at 689-90. Ashutosh Bhagwat criticizes the Court in later cases applying the *O'Brien* test for failing to adequately consider this factor: "In particular, despite the obvious similarities between the *O'Brien* and *Ward* tests, in applying *O'Brien* the Court does not seem inclined to enforce an 'ample alternative channels of communication' requirement with any force and therefore essentially never upholds free speech claims." Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 792 (footnote omitted). It is hard to know why "reasonable alternative channels of communication" has become such a weighty factor in time, place, and manner cases. *Spence* rejected alternative forms of communication as a valid factor, but in a case involving the content of speech, not a content-neutral regulation. Spence v. Washington, 418 U.S. 405, 411 n.4 (1974). Because the Court in *Spence* viewed the flag law in that case as being content-based, not content-neutral, the Court in *Spence* did not apply the *O'Brien* intermediate test. *See id*. at 414 n.8.

130. The Court in *Thomas v. Collins*, 323 U.S. 516 (1945), uses classic language in stating the value of free speech:

> Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice.

Id. at 529-30 (citations omitted).

131. *See supra* notes 128-29.

132. By saying that the law must be narrowly tailored, I do not mean to suggest that the approach is the same as the compelling state interest/least restricted alternative approach. In *Ward*, the Court upheld a content-neutral regulation of sound decibels at a public outdoor concert venue. Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989). The Court held, "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id*.

133. *O'Brien*, 391 U.S. at 377. The Court further stated, "We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction." *Id.* at 381.

considered, but it should not be assumed that the conduct aspects will always have a more significant effect on the competing state interests.

O'Brien, by stating a separate test for symbolic speech than pure speech, encourages the mistaken view that symbolic speech gets less protection than pure speech. *Johnson* perpetuates that mistake. Although there are instances in which symbolic speech will affect more state interests than pure speech, this is not always the case. There is no reason to assume that symbolic speech will always affect state interests more harshly. The intermediate test—whether the *O'Brien* test or the essentially interchangeable time, place, and manner test—allows for the careful balancing of the competing interests at stake.

IV. The Supreme Court's Attempt to Define Symbolic Speech

A. The Spence *Case*

In *Spence v. Washington*, the United States Supreme Court attempted its only meaningful effort at defining symbolic speech.[134] The defendant, Spence, hung a United States flag upside down outside of his apartment with the trident peace symbol affixed with glossy black tape.[135] According to Spence's own statement, he did this in protest of the United States invasion of Cambodia during the Vietnam War and the subsequent killing of Kent State students protesting that invasion.[136] Spence was convicted under a Washington state law which made it a misdemeanor to place "any word, figure, mark, picture, design, drawing or advertisement" upon the flag of the United States and to "[e]xpose to public view" any such display.[137] The Washington Court of Appeals found that the state law was an overbroad violation of Spence's free speech rights.[138] Using eloquent language, the court called "the American flag . . . an identifying, history-preserving and ideological symbol."[139] The Washington Supreme

134. *Spence*, 418 U.S. 405.

135. *Id.* at 405; State v. Spence, 506 P.2d 293, 295 (Wash. 1973).

136. *Spence*, 418 U.S. at 407-08.

137. *Id.* at 406-07 (citing WASH. REV. CODE § 9.86.020(1)-(2)).

138. State v. Spence, 490 P.2d 1321, 1327-28 (Wash. Ct. App. 1971).

139. *Id.* at 1324. The court of appeals's language is as inspiring as that in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943):

> The flag does not bear a single message, orthodox or unorthodox; nor is it the sole preserve of government or the sole preserve of any one person, group or interest. It does not serve to freeze past or existing institutions or past or existing points of view. Born out of the vicissitudes of change, and itself a striking and eloquent manifestation of that change, it would be strange indeed if it proved inhospitable to the constitutionally protected appeal for change by lawful means. Hence, the flag is both an appeal for loyalty to existing America, its policies and its ideals, and an invitation for peaceful change to bring America closer to heart's desire.

Court, reversing the lower court, was disdainful of any claimed free speech rights.[140] The court said, "The statute does not purport to inhibit speech of any kind whether actual or symbolic, printed or auditory; it merely says that one cannot use the flag of the United States as the material upon which to print his utterance . . . ."[141] Though without the enthusiastic grandeur of the state court of appeals, the United States Supreme Court reversed the Washington Supreme Court:

> The Court for decades has recognized the communicative connotations of the use of flags. In many of their uses flags are a form of symbolism comprising a 'primitive but effective way of communicating ideas . . .,' and 'a short cut from mind to mind.' On this record there can be little doubt that appellant communicated through the use of symbols. The symbolism included not only the flag but also the superimposed peace symbol.[142]

The state supreme court's view that no speech issues were implicated since the law left open all other means for communication other than the use of the flag, was "summarily" rejected by the Supreme Court.[143]

> In short, the American flag is an identifying, history-preserving and ideological symbol.

Spence, 490 P.2d at 1324.

140. *See Spence*, 506 P.2d at 299.

141. *Id.*

142. *Spence*, 418 U.S. at 410 (quoting *Barnette*, 319 U.S. at 632) (citations omitted).

143. *Id.* at 411 n.4. *Spence* is often cited for the proposition that alternative forms of communication is an irrelevant factor. *See, e.g.*, Regan v. Time, Inc., 468 U.S. 641 (1984). In striking down a federal law banning the use of real currency in photographs, the Court stated: "Contrary to appellants' contention, a statute that substantially abridges a uniquely valuable form of expression of this kind cannot be defended on the ground that, in appellants' judgment, the speaker can express the same ideas in some other way." *Id.* at 678 (citation omitted); *see also* Cal. Democratic Party v. Jones, 530 U.S. 567, 581 (2000) ("In the end, however, the effect of Proposition 198 [limiting political parties] on these other activities is beside the point. We have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired."); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 417 n.6 (2000) ("This justification, however, is peculiar because we have rejected the notion that a law will pass First Amendment muster simply because it leaves open other opportunities.") (Thomas, J., dissenting). Nonetheless, when the Court says that leaving alternative methods of communication open is irrelevant, it is referring to the regulation of the content of speech. When it comes to the regulation of the time, place, and manner of speech, the availability of alternative means and places for speech is a relevant part of the balancing test applied in those cases. See, for example, *Consolidated Edison Co. of New York v. Public Service Commission of New York*, 447 U.S. 530 (1980), which expressly stated that difference:

> Although a time, place, and manner restriction cannot be upheld without

The *Spence* opinion is most famous for its attempt to distinguish between those symbolic acts that qualify as speech under the protection of the First Amendment and that "apparently limitless variety of conduct," that, though communicative of something, have no protection as free speech and likely can be regulated if there is any rational basis for doing so.[144] Given that the state had conceded the communicative aspect of the peace symbol on the distressed display of the American flag, it was not necessary for the Court to undertake the challenge of defining when expressive conduct was speech.[145] *Stromberg*, decided over forty years earlier, had made clear that flags were a form of speech.[146] The Court did not need a new definition of symbolic speech for something so obvious. Accepting the use of the flag, the misuse of a flag, or the flag itself as speech was the easy issue.[147] The hard issue was whether the physical misuse of the American flag was protected speech or not.[148] That was certainly an open question. Just three years before, in a case involving the use of the flag in the name of art in various degrading ways, the Court had affirmed by a 4-4 vote a conviction for contempt of the flag.[149]

> examination of alternative avenues of communication open to potential speakers, we have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression.

Id. at 541 n.10 (citation omitted).

144. *Spence*, 418 U.S. at 409 (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)).

145. *Id.*

146. The Washington Supreme Court distinguished *Stromberg v. California*, 283 U.S. 359 (1931), as involving a red flag in protest of the government, not our national flag. *Spence*, 506 P.2d at 299.

147. I do not mean to say that all activities involving flags are necessarily speech. Uses of the flag with no apparent communicative purpose may not be speech at all. For example, in *Royal v. Superior Court of New Hampshire*, a person stopped for speeding in Portsmouth, New Hampshire, was arrested for having an American flag patch on the sleeve of his jacket. 397 F. Supp. 260, 260-61 (D.N.H. 1975), *rev'd on other grounds*, 531 F.2d 1084 (1st Cir. 1976). The federal court did not accept his claim that wearing the flag was "cool" and therefore sufficiently communicative to deserve protection as symbolic speech. *Id.* at 261-63. Determining whether the burning of a "smiley face" on an American flag that hung on a garage was a political statement protesting corruption of the legal system or a product of boredom was crucial to the court in *Winsness v. Campbell*, No. 2:04-CV-904 TS, 2006 WL 463529 (D. Utah Feb. 24, 2006). Somewhat surprisingly, the court said that it would be a jury decision to determine whether free speech rights were involved. *Id.* at *8.

148. The Court in *Street v. New York*, 394 U.S. 576 (1969), had found that just talking negatively about the flag could not be made a crime.

149. Radich v. New York, 401 U.S. 531 (1971) (per curiam). In *Radich*, a Madison Avenue, New York City art gallery display of "'an erect penis wrapped in an American flag protruding from the vertical standard'" and other artistic abuses of the flag had been found to be unprotected symbolic speech by the state courts. People v. Radich, 257 N.E.2d 30, 32 n.2 (N.Y. 1970) (quoting People v. Radich, 279 N.Y.S.2d 680, 682 (N.Y. City Crim. Ct. 1967)). Finding

Spence was perhaps not the best case for the Court to attempt to define what symbolic acts would fall within free speech protection. There were no difficult lines to draw in *Spence*, no careful balancing of interest required, no conundrums of thought to sharpen the analysis; and thus it is perhaps no surprise that the *Spence* opinion is so haphazard in its attempt to draw those lines.[150] True, the state supreme court had said that no speech was involved but because of the type of regulation, not because of expressive conduct.[151] The court had said that the state law was no more a regulation of speech than a noise ordinance.[152]

Nonetheless, turning to the task of defining speech, the Court in *Spence* said that it was "necessary to determine" if the conduct "was sufficiently imbued with elements of communication to fall within the" protection of the First Amendment.[153] The Court said three factors were important in determining this

---

that the 4-4 affirmance by the United States Supreme Court was not a decision on the merits, the Second Circuit later granted a petition for *habeas* relief and remanded for a decision on the merits. United States *ex rel.* Radich v. Crim. Ct. of the City of N.Y., 459 F.2d 745, 746 (2d Cir. 1972). In another case, the Supreme Court agreed with the Second Circuit's decision. Neil v. Biggers, 409 U.S. 188, 192 n.2 (1972). By the time *Radich* came back to the trial court, *Spence* had been decided. Reaching the merits and applying *Spence*, the court in *United States ex rel. Radich v. Criminal Court of the City of New York*, 385 F. Supp. 165 (S.D.N.Y. 1974), overturned the conviction. In dismissing the case on the merits, the *Radich* court also referenced five appeals involving flags dismissed by the Supreme Court after *Spence*. *Id.* at 173 n.29.

150. Even the state's justification for regulating uses of the flag was weak. The state supreme court had disclaimed any concern for breach of peace, such as in the fighting words cases. *Spence*, 506 P.2d at 299 n.1 ("We think it inappropriate and fruitless to initiate an analysis of those recent cases which relate to freedom of speech, 'fighting words,' and public obscenity as inaugurated in Chaplinsky v. New Hampshire, [315 U.S. 568 (1942)]."). The state supreme court had relied on the state's interest in protecting the flag as our national symbol. *Spence*, 418 U.S. at 412-14. The counsel for the state rejected this rationale and argued before the United States Supreme Court that breach of peace was indeed the state's concern, though no facts supported this claim. *Id.* at 411. See *Texas v. Johnson*, where the Court actually discusses the "fighting words" cases and finds no actual danger of breach of peace in the context of the flag burning in that case. Texas v. Johnson, 491 U.S. 397, 409-10 (1989).

151. *See Spence*, 506 P.2d at 299.

152. *Id.* at 300. The Washington Supreme Court said,

> Defendant's freedom of speech and communication is no more impaired by this statute than would his rights to symbolic speech be abridged by an antinoise ordinance prohibiting the use of sound tracks at certain places and hours or the needless sounding of automobile horns and bells—or unnecessary noise next to a school.

Id.

153. *Spence*, 418 U.S. at 409. Previously, in *Tinker*, the Court had used the phrase "closely akin to 'pure speech'" as to the wearing of black arm bands at a public school in protest of the Vietnam War and concluded that such symbolic acts were "entitled to comprehensive protection

imbued test: the nature of appellant's activity, the factual context of the activity, and the environment in which the activity was undertaken.[154] As for the nature of the activity, the Court said that it had long "recognized the communicative connotations of the use of flags."[155] In Spence's case, the Court said that it had "little doubt," that he had communicated through the use of symbols, both the upside down flag and the superimposed peace symbol.[156] At another point, the Court said that Spence had not engaged in "an act of mindless nihilism,"[157] but rather "a pointed expression of anguish."[158] The Court then observed: "An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[159] Both of these points seem to go to the nature of the activity—it was an attempt to communicate and was understood as such. In terms of the context, the Court pointed to Spence's unchallenged statement at his trial that the protest was generated by the recent expansion of the Vietnam War into Cambodia and the subsequent killings of Kent State students in protest of that expansion.[160] Others would be aware of these facts, and in this context

---

under the First Amendment." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505-06 (1969). After *Spence*, the *Johnson* case referred to the American flag as "[p]regnant with expressive content." *Johnson*, 491 U.S. at 405. All three of these phrases, "closely akin to 'pure speech,'" "imbued with elements of communication," and "pregnant with expressive content," suggest a similar closeness between the symbolic conduct and speech.

154. *Spence*, 418 U.S. at 409-10.

155. *Id.* at 410.

156. *Id.*

157. *Id.* Spence said that he used tape to form the peace symbol so that he would not damage the flag. *Id.* at 408. In fact, Spence was not charged with flag desecration—a more serious offense, defined as "publicly mutilating, defacing, defiling, burning, or trampling" the flag—he was charged with improper use of the flag which prohibited the displaying of any American flag with "any word, figure, mark, picture, design, drawing or advertisement of any nature." *Id.* at 406 n.1, 407; *see also* Cline v. Rockingham County Super. Ct., 502 F.2d 789, 790-91 (1st Cir. 1974) (finding a flag on a blanket with the peace symbol marked with indelible ink indistinguishable from *Spence*, and thus protected).

158. *Spence*, 418 U.S. at 410. This description of Spence's protest seems a bit overstated. When the police knocked on his door, he said, "'I suppose you are here about the flag. I didn't know there was anything wrong with it. I will take it down.'" *Id.* at 406 (quoting the appellant). Again, compare *Cline*, where the lower court assumed an expression of anxiety under facts that make it appear that the young man in question seemed to have nothing more on his mind than buying a new pair of shoes and happened to have a flag with a peace symbol on a blanket over his shoulder. *Cline*, 502 F.2d at 789-90.

159. *Spence*, 418 U.S. at 410-11. As the test is stated, it seems to focus on the intent of the speaker; but, as actually applied, the focus is on the message. It appears that if there is the right kind of message, it is assumed that it was this message the speaker intended to communicate.

160. *Id.* at 410.

the action had a known meaning.[161] As for the environment factor, the Court thought that it was important that the protest was on private property, his own home,[162] and involved Spence's privately owned flag, and not in a public area or other environment over which the state might have some nonspeech related reasons for regulating the area.[163]

Although it seems clear that the *Spence* court intended a single test, the imbued test, the reference to a "particularized message" has become a separate test, the message test. Lower courts tend overwhelmingly to prefer the message test, breaking the message test down into its component parts: first, determining whether the symbolic acts were intended to communicate a particularized message; and second, deciding if their was a great likelihood that it would be understood. Although *Spence* likely intended a single test, it makes sense to treat the imbued test and message test separately, and later courts tend to emphasize one over the other. Although a few lower courts apply only the imbued test,[164] the most common approach is to just mention the imbued language and then to apply the message test.[165]

---

161. *See id.* at 411.

162. Another holding that *Spence* supports is that the home is a specially valued place for the exercise of free speech rights. See, for example, *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), which mentions *Spence* and other cases in striking down a ban on issue statements attached to homes but only in the context of speech in one's home being especially protected: "A special respect for individual liberty in the home has long been part of our culture and our law . . . ." *Id.* at 58.

163. *Spence*, 418 U.S. at 411.

164. The Sixth Circuit did not mention the message test and applied only the imbued test in a 1994 case. Pinette v. Capitol Square Review & Adv. Bd., 30 F.3d 675, 678 (6th Cir. 1994), *aff'd*, 515 U.S. 753 (1995). The Sixth Circuit found that a cross installed by the Ku Klux Klan in a designated public forum was symbolic speech and was therefore protected. *Id.* at 680. Without reference to symbolic speech or *Spence*, the Supreme Court affirmed that the speech was protected. *Pinette*, 515 U.S. at 769. For additional discussion, see *infra* Section V.B.

165. Cases that mention both the imbued test and the message test but discuss only the message test are numerous. Typical is *Hernandez v. Superintendent, Fredericksburg-Rappahannock Joint Security Center*, 800 F. Supp. 1344 (E.D. Va. 1992):

> [W]e have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments."
>
> The test for determining whether conduct qualifies as protected "speech" is whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."

Id. at 1349 (citation omitted) (alterations in original). For additional discussion, see *infra* Section V.B.

B. Supreme Court Decisions Involving Spence

The first Supreme Court case to mention *Spence* was decided some ten years later in *Clark v. Community for Creative Non-Violence*.[166] The Court assumed, without deciding, that sleeping in a tent in a park opposite the White House to protest the treatment of the homeless was free speech.[167] The Court's summary treatment of the *Spence* test referenced only the message test: "It is also true that a message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative."[168] The concession that sleeping in a temporary tent city was speech is indicative of the Court's reluctance to draw lines between protected speech and mere conduct. By dismissing this aspect of the case through its half-hearted concession, the Court could easily conclude that even if speech was involved, the governmental interest in regulating the time, place, and manner of the use of public parks justified the restriction.[169] Justice Marshall's dissent also focused on the message test, referring to the speaker's intent and the audience's perception as being key factors.[170]

Four years later, the Supreme Court in *Texas v. Johnson*[171] gave its most complete statement, other than *Spence*, with regard to defining symbolic speech.[172] First, the Court acknowledged the obvious: the First Amendment's

---

166. 468 U.S. 288 (1984).

167. *Id.* at 293.

168. *Id.* at 294 (citing *Spence*, 418 U.S. 405; Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)).

169. *Id.* at 293-99. Notice how every part of the intermediate free speech test was easy for the Court. "The requirement that the regulation be content-neutral is clearly satisfied." *Id.* at 295. "It is also apparent to us that the regulation narrowly focuses on the Government's substantial interest in maintaining [the national park]." *Id.* at 296. "We have difficulty, therefore, in understanding why the prohibition against camping, with its ban on sleeping overnight, is not a reasonable time, place, or manner regulation that withstands constitutional scrutiny." *Id.* at 297.

170. *Id.* at 305 (Marshall, J., dissenting). The dissent said,

> Here respondents clearly intended to protest the reality of homelessness by sleeping outdoors in the winter in the near vicinity of the magisterial residence of the President of the United States. . . .
>
> Nor can there be any doubt that in the surrounding circumstances the likelihood was great that the political significance of sleeping in the parks would be understood by those who viewed it.

Id.

171. 491 U.S. 397 (1989). Seven years before, the Court had denied certiorari in another flag burning case, *Kime v. United States*, 459 U.S. 949 (1982), in which the participants had been sentenced to eight months of imprisonment.

172. *Johnson*, 491 U.S. at 402-03.

free speech clause is not limited to written or oral speech.[173] Second, it repeated the caution from *O'Brien* that "an apparently limitless variety of conduct" was not speech just because it was intended as communication.[174] Third, the Court said that *Spence* had recognized that, to qualify as speech, conduct had to be "sufficiently imbued with elements of communication."[175] The Court then seemed to fold the imbued requirement into the message requirement:

> In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."[176]

Emphasizing *Spence*'s imbued element, the Court singled out the Flag cases involving the attaching of things to the flag, saluting the flag, and displaying the red flag as examples of where it had found conduct as being sufficiently communicative to be speech.[177] The Court said that it had never held that all conduct related to flags would be automatically communicative, but that courts had to consider the context of the flag's symbolic use.[178] The burning of the flag in the particular case's context was, the Court said, communicative.[179] The opinion even quoted Rehnquist's dissent in *Smith v. Goguen*, in which he had said that the American flag was "the one visible manifestation of two hundred years of nationhood."[180] The state of Texas, like the state of Washington in *Spence*, had conceded that speech was involved.[181] The Court called it a prudent concession.[182] Since the protest's context was the nomination of Ronald Reagan as president, the state could do little else.[183] This led the Court

---

173. *Id.* at 404.

174. *Id.* (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)).

175. *Id.* (quoting Spence v. Washington, 418 U.S. 405, 409 (1974)).

176. *Id.* (alterations in original). The Court identified examples of conduct sufficiently communicative to be speech as "wearing of black arm bands . . ., a sit-in by blacks in a 'whites only' area to protest segregation, . . . the wearing of American military uniforms in a dramatic presentation . . ., and of picketing about a wide variety of causes." *Id.* (citations omitted).

177. *Johnson*, 491 U.S. at 404-05 (citing *Spence*, 418 U.S. at 409-10 (attaching things to the flag); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) (saluting the flag); Stromberg v. California, 283 U.S. 359, 368-69 (1931) (displaying red flag)).

178. *Id.* at 405.

179. *Id.* at 405-06.

180. *Id.* at 405 (quoting Smith v. Goguen, 415 U.S. 566, 603 (1974) (Rehnquist, J., dissenting)). One can only imagine how quoting his statement intended to protect the flag, as justification to burn the flag, must have frosted the good justice.

181. *Id.* at 405-06. The concession was said to be for purposes of oral argument. *Id.* at 405.

182. *Id.* at 406.

183. *Id.*

to comment that "[t]he expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent."[184] While it seems that the Court was only stating the obvious, the phrase "overwhelmingly apparent" became important in later cases.[185] Again, seeming to indicate its emphasis on the imbued element, the Court concluded that Johnson's burning of the flag was "sufficiently imbued with elements of communication" to come within the protection of free speech.[186] The fact that *Johnson* involved flags, perhaps, made the imbued element the obvious point to emphasize.

Also decided in 1989 was *City of Dallas v. Stanglin*.[187] Though there is no mention of *Spence* or any other symbolic speech case, this decision used language that has become important in symbolic speech cases. *Stanglin* involved a challenge to a Dallas city law that limited the age of persons who could frequent certain dance halls to persons between fourteen and eighteen years old.[188] The dance halls were created by city law to allow a place for young people to dance without alcohol being served.[189] The lower court, the Texas Court of Appeals, found the law in violation of the free speech associational rights of minors.[190] The Supreme Court reversed, finding no free speech issues at all.[191] The Court said that it had recognized in past cases that free speech "means more than simply the right to talk and to write."[192] Yet, it rejected the claim that recreational dancing was protected by the First Amendment.[193] In memorable language it said: "It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall —but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."[194] While the *Stanglin* Court does not itself mention anything about symbolic speech as such, the colorful reference to "some kernel of

184. *Id.*

185. *See infra* note 277 and accompanying text.

186. *Johnson*, 491 U.S. at 406 (quoting Spence v. Washington, 418 U.S. 405, 409 (1974)). It is not clear, but for his trial testimony, that anyone would have exactly figured out that Johnson was making a comment about Reagan's nomination: "The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech . . . couldn't have been made at that time. It's quite a [juxtaposition]. We had new patriotism and no patriotism." *Id.* (internal quotation marks omitted).

187. 490 U.S. 19 (1989).

188. *Id.* at 20.

189. *Id.* at 21.

190. *Id.* at 20-21.

191. *Id.* at 21.

192. *Id.* at 25.

193. *Id.*

194. *Id.*

expression" is widely quoted,[195] often along with *O'Brien*'s reference to the First Amendment not protecting a "limitless variety of conduct."[196] *O'Brien* means that there is a limit on expressive conduct that the Court will treat as speech, and *Stanglin* means that at the very least that limit is that there must be something more than "some kernel of expression."

The only other Supreme Court case to mention *Spence* in any meaningful way was *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*.[197] Here, Justice Souter, after a lengthy discussion of marching and parades as a form of speech, almost gratuitously slams at least part of the *Spence* test.[198] In *Hurley*, the issue was whether the private organization running the annual St. Patrick's Day parade was sufficiently expressive to qualify as an expressive association.[199] Many state and local laws regulating racial and gender discrimination by private associations have generated considerable litigation, including a number of cases at the Supreme Court level.[200] Historically, the Court had treated the freedom of association as a corollary of free speech and entitled to the same presumptive protection level as free speech.[201] The more recent attempts by the government to regulate race

---

195. *See, e.g.*, Thaeter v. Palm Beach County Sheriff's Office, 449 F.3d 1342, 1354 n.8 (11th Cir. 2006) (no free speech violation in firing public employee for appearing in sexually explicit internet film); Festa v. N.Y. City Dep't of Consumer Affairs, 820 N.Y.S.2d 452, 457-58 (N.Y. Sup. Ct. 2006) (New York lower court found that New York cabaret law limiting dancing in restaurants and bars did not violate free speech rights under U.S. Constitution or under the more broad New York Constitution).

196. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 570 (1991); *see also* Daly v. Harris, 215 F. Supp. 2d 1098, 1108 (D. Haw. 2002) (a $3.00 fee to non-residents to enter city underwater park and fish sanctuary did not violate free speech rights); Samuels v. N.Y. State Dep't of Health, 811 N.Y.S.2d 136, 146-47 (N.Y. App. Div. 2006) (New York lower court found that New York law limiting marriage to opposite sex couples did not violate free speech rights of same sex couples); *cf.* Elam v. Bolling, 53 F. Supp. 2d 854, 859 (W.D. Va. 1999) (using the *Stanglin* language in finding a permit scheme for public dancing to be an invalid prior restraint; *O'Brien* was cited but not quoted).

197. 515 U.S. 557, 569 (1995).

198. *See id.*

199. *Id.* at 562-66. The Court found that "[r]espondents' participation as a unit in the parade was equally expressive." *Id.* at 570.

200. *See, e.g.*, N.Y. State Club Ass'n v. City of N.Y., 487 U.S. 1 (1988); Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).

201. The seminal freedom of association case is *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), where the Court stated:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the

and gender discrimination by private associations seems to have led the Court to distinguish between expressive associations which received a high level of protection of free speech—usually the compelling state interest test—and non-expressive societal associations which could be regulated like other businesses, basically subject to regulation if there was some rational basis for the law.[202] The distinction between the two types of association certainly makes some sense. A college sorority or fraternity is an association of like minded persons, but they are not typically comparable to advocacy groups like the ACLU or the NRA, advocating, respectively, a civil rights and a gun owner rights agenda. This distinction requires the Court to make a preliminary determination as to whether a particular group is primarily expressive or primarily nonexpressive.[203]

In *Hurley*, Massachusetts had banned discrimination based upon sexual orientation as to certain private associations.[204] The private group putting on the

---

> "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

Id. at 460-61 (citations omitted).

202. There have been a number of recent cases involving an attempt to define expressive association, but the actual lines are still far from developed. In upholding a state law banning race and gender discrimination by large private clubs, the Court said in *New York State Club Ass'n*, "This is not to say, however, that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution." 487 U.S. at 13 (citations omitted). In *Roberts*, the Court indicated that in addition to the free speech protection of expressive associations, "intimate associations" may be protected as part of the right to privacy and may go beyond traditional intimate relationships such as marriage or family, but the Court has not as of yet decided a case involving such an extended view of "intimate association." *Roberts*, 468 U.S. at 618-19.

203. Although *Roberts* was the beginning of this approach, the majority actually applied a weak version of the compelling state interest test in upholding the state's ban on gender discrimination by certain private associations. *Roberts*, 468 U.S. at 623-29. It was Justice O'Connor's concurring opinion that made the distinction between expressive and nonexpressive associations, with the nonexpressive associations getting only a rationality test. *Id.* at 638 (O'Connor, J., concurring). She concluded:

> In summary, this Court's case law recognizes radically different constitutional protections for expressive and nonexpressive associations. . . . [N]o First Amendment interest stands in the way of a State's rational regulation of economic transactions by or within a commercial association. The proper approach to analysis of First Amendment claims of associational freedom is, therefore, to distinguish nonexpressive from expressive associations and to recognize that the former lack the full constitutional protections possessed by the latter.

Id.

204. *Hurley*, 515 U.S. at 561. The state law prohibited "any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to,

parade banned floats and entries with gay themes, because, they said, they were contrary to the organization's "religious and social values."[205] If the group was expressive, then the state law banning discrimination based upon sexual orientation was in violation of their free speech right to choose what to espouse.[206] Justice Souter looked at the past Supreme Court cases involving this issue and concluded that the private group was expressive in nature because it was putting on a parade and parades are inherently expressive.[207] As part of this conclusion, he mentioned the various types of free speech activities that a private association might engage in—a list often included in any delineation of symbolic free speech related conduct.[208] The *Hurley* case itself did not involve symbolic speech, just whether the group was expressive at all.[209] However, seemingly out of nowhere, Justice Souter criticized *Spence*'s message test. He wrote:

> As some of these examples show, a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a "particularized message," would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll.[210]

As discussed below, the impact of this *Hurley* language was that a number of the lower courts have concluded that the *Spence* message test has been either eliminated or modified significantly to protect more expressive conduct.[211]

In *Wisconsin v. Mitchell*, decided two years before *Hurley*, the Court only cited *Spence* once.[212] This citation was perhaps significant, seeming to support

---

or treatment in any place of public accommodation, resort or amusement." *Id.* (quoting MASS. GEN. LAWS ch. 272, § 98 (1992)) (omissions in original).

205. *Id.* at 562. Hurley said that the state courts had rejected the private claim that its exclusion of "groups with sexual themes merely formalized [the fact] that the Parade expresses traditional religious and social values." *Id.* (alteration in original).

206. *Id.* at 573 ("But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.").

207. *Id.* at 568 ("Parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches.").

208. *Id.* at 569 ("[O]ur cases have recognized that the First Amendment shields such acts as saluting a flag (and refusing to do so), wearing an armband to protest a war, displaying a red flag, and even '[m]arching, walking or parading' in uniforms displaying the swastika." (citations omitted)).

209. *Id.* at 568.

210. *Id.* at 569 (citation omitted).

211. *See infra* Part V.C.

212. Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993).

the imbued part of the *Spence* test.[213] The Court in *Mitchell* held that a state law enhancing punishment upon a finding that it was a "hate" crime did not infringe on the free speech rights.[214] The Court said that the law did not "punish bigoted thought," but rather punished only "conduct."[215] The Court continued that just because a "limitless variety of conduct" is intended to express an idea does not mean that the conduct is speech.[216] *Spence* is then cited, referencing the page in which the *Spence* court mentions the imbued test.[217] The Court goes on to say that "a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment,"[218] that "[v]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection,"[219] and finally that "[t]he First Amendment does not protect violence."[220] Given the ambiguity of the reference to *Spence*, one cannot make too much of *Mitchell*. However, its reasoning is similar to the logic of the imbued test. This may mean that conduct, to be protected as speech, must be similar to speech in that it communicates without threatening other interests. Criticizing someone whose views we disagree with is easily distinguished from beating someone up because we disagree with their views. Waving a flag with a peace symbol to protest the Vietnam War is easily distinguished from dumping blood on draft records to protest the war.[221] We see the message in both, but it is easier for us to accept that flag waving is closer to the kind of communication intended to be

---

213. *See id.* at 484.

214. *Id.* at 483 n.4, 490.

215. *Id.* at 484.

216. *Id.* (citing United States v. O'Brien, 391 U.S. 367, 376 (1968)).

217. *Id.* at 484 (citing Spence v. Washington, 418 U.S. 405, 409 (1974)).

218. *Id.* (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984)).

219. *Id.* (quoting *Roberts*, 468 U.S. at 628) (internal quotation marks omitted) (omission in original).

220. *Id.* (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982)) (internal quotation marks omitted); *see also* United States v. McDermott, 822 F. Supp. 582, 584 (N.D. Iowa 1993) ("The McDermotts assert[ed] that cross-burning is expressive conduct which should be treated as speech under the First Amendment."). The Maryland Court of Appeals in *State v. Sheldon*, 629 A.2d 753 (Md. 1993), found a state law requiring private property owner permission and notification to the fire department prior to a cross burning on the private property to be contrary to the symbolic speech rights of an individual who burned a cross on the property of an African American family without permission or notification. Applying only the *Spence* message test, the court easily concluded that cross burning was symbolic speech and the regulation an invalid content-based regulation of speech. *Id.* at 50-52, 64.

221. *See* Ely, *supra* note 82 at 1495 n.52 ("For Professor Emerson, the pouring of blood on selective service files would also be unprotected: 'To attempt to bring such forms of protest within the expression category would rob the distinction between expression and action of all meaning . . . .'" (quoting EMERSON, *supra* note 93, at 89) (omission in original)).

protected by the First Amendment than the wanton destruction of blood flowing on government files.

Justices Rehnquist's plurality opinion in *Barnes v. Glen Theatre, Inc.*, without any mention of *Spence*, found that language in the Court's past cases supported the court of appeals' holding that nude dancing was "expressive conduct within the outer perimeters of the First Amendment."[222] The Court then added editorially, "though we view it as only marginally so."[223] The plurality opinion then, applying the *O'Brien* test, concluded that Indiana's requirement of pasties and G-strings was a content-neutral regulation advancing the substantial governmental interest in public morality.[224] Justice Scalia, in a concurring opinion, took a very different approach. He emphasized only the intent of the regulation.[225] He stated as a general proposition, citing a string of cases, that the First Amendment protects expressive conduct when "the government prohibits conduct *precisely because of its communicative attributes*."[226] Interestingly, in a footnote, Justice Scalia takes something of an "imbued test" approach as part of his "intent" test. He wrote:

> It is easy to conclude that conduct has been forbidden because of its communicative attributes when the conduct in question is what the Court has called "inherently expressive," and what I would prefer to call "conventionally expressive"—such as flying a red flag. I mean by that phrase (as I assume the Court means by "inherently expressive") conduct that is normally engaged in for the purpose of communicating an idea, or perhaps an emotion, to someone else.[227]

---

222. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991).

223. *Id.*

224. *Id.* at 566-69.

225. *Id.* at 576-80 (Scalia, J., concurring). Scalia had first used this government intent test in a dissenting opinion as a Court of Appeals judge in *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622-23 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd sub nom.* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984).

226. *Barnes*, 501 U.S. at 577 (Scalia, J., concurring); *see also infra* text accompanying notes 280-97.

227. *Barnes*, 501 U.S. at 577 n.4. The majority in *Barnes* does not in fact use the "inherently expressive" term, but Justice Souter does in his concurring opinion. *Id.* at 581 (Souter, J., concurring). The majority of the Court does later use the term in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), where the majority referred to "the inherent expressiveness of marching." *Id.* at 568. Also, in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47 (2006), the Court said that "a law school's decision to allow recruiters on campus is not inherently expressive." *Id.* at 64. *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), also uses the phrase in a reference to *Barnes*. *Pap's A.M.*, 529 U.S. at 289.

Citing *Stanglin*, Scalia was not sure whether dancing ever fit the description of "inherently expressive."[228] Nevertheless, he was comfortable in saying that "even if it does, this law is directed against nudity, not dancing. Nudity is *not* normally engaged in for the purpose of communicating an idea or an emotion."[229] Scalia's reference to "inherently" or "conventionally" expressive seems similar to the Court's imbued test in *Spence* in that it suggests that certain types of conduct are more closely akin to free speech than others.[230] Remember that in *Hurley*, four years later, the Court referred to the "inherent expressiveness of marching" as being important in finding the association at issue to be an expressive one.[231]

In its most recent case involving expressive conduct, the Court in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*) found that law schools did not have a free speech right to unequal treatment of military recruiters when federal law required equal treatment.[232] The law schools discriminated against military recruiters in order to protest the Pentagon's "don't ask, don't tell" oppressive treatment of gays in the military.[233] The Court said that the fact that the law schools took these steps out of protest did not mean that free speech rights were involved.[234] Though *FAIR* does not mention the *Spence* case, it potentially imposes a restrictive definition of the *Spence* message test. In *FAIR*, the Court seemed to go out of its way to use the term "inherently expressive."[235] Unlike some of the other cases, *FAIR*'s use of the phrase seems less like something similar to the imbued test, and more like a limitation on the message test.[236] The Court in *FAIR* seemed to be making almost a new test out of the phrase. The Court said that unlike parades in

228. *Barnes*, 501 U.S. at 577 n.4 (Scalia, J., concurring) (stating that a "social dance group 'do[es] not involve the sort of expressive association that the First Amendment has been held to protect'" (quoting City of Dallas v. Stanglin, 490 U.S. 19, 24 (1989))). As the dissent points out, the social dancing in *Stanglin* had nothing to do with dance as performance in *Barnes*, even the marginally proficient dancing found in a strip club. *Id.* at 587 n.1 (White, J., dissenting).

229. *Id.* at 577 n.4 (Scalia, J., concurring).

230. *See id.*

231. *Hurley*, 515 U.S. at 568.

232. *FAIR*, 547 U.S. at 70. Some law schools excluded organizations from using normal law school placement services if the employers engaged in discrimination based upon sexual orientation which for many law schools included the "don't ask, don't tell" policies of the United States military branches. *Id.* at 51. A federal law—the Solomon Amendment—provided that universities discriminating against the military, as an employer, would lose certain federal funding. *Id.*

233. *See id.* at 52 n.1.

234. *Id.* at 65-66.

235. *See id.* at 64, 66.

236. *See id.*

Hurley or the flag burning in *Johnson*, "a law school's decision to allow recruiters on campus is not inherently expressive."[237] Then later, it seemed to ratchet this new test up a notch by saying that "we have extended First Amendment protection only to conduct that is inherently expressive."[238] The Court found the law schools' actions to be expressive "only because the law schools accompanied their conduct with speech explaining it."[239] The Court then said, "For example, the point of requiring military interviews to be conducted on the undergraduate campus is not 'overwhelmingly apparent.'"[240] As discussed below, some lower courts had already concluded that the *Johnson* use of the phrase "overwhelmingly apparent" indicates that *Spence*'s requirement of a particularized message is too permissive in its definition of symbolic speech.[241] The puzzling use of the phrase in *FAIR* may give support to that approach.

The decision in *FAIR*, that the unequal treatment of military employers was not speech, is not particularly troubling. All of the claims of free speech in *FAIR* seemed more on the level of a law school professor's hypothetical than any real effort at speech. Certainly, law schools were making a point, but that did not make their mistreatment of the military service employers speech. In an almost classic way, the law schools were engaged in civil disobedience, not in theater. The schools seemed to be playing a game of chicken with Congress over how much they could get away with before their universities would lose their federal funds. It is true that much of the mistreatment of the military employers was more symbolic than real, but it was nonetheless civil disobedience. For instance, one example of mistreatment that the Court focused on in finding nothing inherently expressive was the requirement at some schools that the military interview law students at the undergraduate campus as opposed to the law school.[242] At my law school, Pepperdine University, such a rule would have meant a walk down and then up the side of mountain overlooking the Pacific Ocean. It is a walk of breathtaking beauty, but also a test of endurance, even for someone joining the military. At most schools, it is unlikely that an interview at the undergraduate campus was anything more than a minor inconvenience to law students and a symbolic slap in the face to the military. Nonetheless, it was a clear violation of federal law and was intended

237. *Id.* at 64.

238. *Id.* at 66. Though the Court cites *Johnson*, the *Johnson* case did not use the term, but it did say that burning the flag was sufficiently expressive. Texas v. Johnson, 491 U.S. 397, 406 (1989).

239. *FAIR*, 547 U.S. at 66.

240. *Id.* (quoting *Johnson*, 491 U.S. at 406).

241. *See infra* note 417 and accompanying text.

242. *FAIR*, 547 U.S. at 66.

as such. Civil disobedience in opposition to a policy as odious as the military's "don't ask, don't tell" mistreatment of gays in the military—and gays interested in being in the military—may be a position much to be admired, but it is nonetheless civil disobedience. When the government penalties were relatively minor, the law schools could maintain their principles. When the stakes became too high for their universities, the law schools all caved.

In the over thirty years since *Spence*, these are the only significant references to *Spence* by the U.S. Supreme Court.[243] In *Clark*, the Court referred to only the message test, but since the Court assumed that sleeping in a tent city protesting homeless policies was expressive conduct, it did not have to undertake any application of even that test.[244] *Clark* is important for finding that the person claiming protection of conduct as speech has the burden of proving that the *Spence* test was satisfied.[245] *Barnes* did not attempt to define when conduct classifies as free speech, merely finding that nude dancing was speech, though just barely.[246] *Barnes* is important only because of Justice Scalia's proposed government intent test as part of the determination of when expressive conduct is speech. *Johnson*, the one case to undertake an actual application of *Spence*, mentioned both the imbued test and the message test and emphasized the imbued portion of the test.[247] *Johnson* also quoted Justice Scalia's government intent test with approval.[248] Of all of the cases following *Spence*, *Johnson* is by far the most important. Some of the lower courts refer to the test as the *Spence-Johnson* test,[249] and some even refer to the *Spence* test as the *Johnson* test.[250] *Stanglin*, though relevant in indicating that something more than just a "kernel of expression" is necessary for conduct to be speech, does not advance either

---

243. In *Wooley v. Maynard*, 430 U.S. 705, 713 n.10 (1977), there is a glancing reference to the *Spence* message test. In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 572 n.36 (1987) (Brennan, J., dissenting), *Spence* is quoted, but not with regard to symbolic speech.

244. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293-94 (1984).

245. *Id.* at 293 n.5 (stating that the burden is on the "person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies").

246. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-66 (1991).

247. *See* Texas v. Johnson, 491 U.S. 397, 404, 406 (1989).

248. *Id.* at 406-07 (citing Cmty. for Creative Non-Violence v. Watt, 703 F.2d 586, 622-23 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd sub nom.* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984)).

249. *See, e.g.*, Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 159 (3d Cir. 2002).

250. *See, e.g.*, Cunningham v. New Jersey, 452 F. Supp. 2d 591, 596 (D.N.J. 2006). Though not expressly calling it the *Johnson* test, even more lower courts attribute the message test to only *Johnson* without citing *Spence*. *See, e.g.*, Nunez v. Davis, 169 F.3d 1222, 1226 (9th Cir. 1999); Draper v. Logan County Pub. Library, 403 F. Supp. 2d 608, 613 (W.D. Ky. 2005); Church of the Am. Knights of the Ku Klux Klan v. City of Erie, 99 F. Supp. 2d 583, 587 (W.D. Pa. 2000).

the message or imbued test.[251] *Mitchell*, though it only cites to *Spence*, provides some limited support for the imbued portion of the test.[252] *Hurley*'s criticism of the particularized requirement of the message test would seem to weaken that portion of the test, but only a few lower courts have used *Hurley* to totally reject the message test.[253] *FAIR* is only important if lower courts take the bait and use the "overwhelmingly important" phrase from *Johnson* as a way of limiting the kinds of expressive conduct treated as speech. That certainly seems likely. While this brief summary does not really reveal why the lower courts have focused on the message test, generally to the exclusion of the imbued test, at the very least it shows that the message test has been acknowledged four times by the Supreme Court after *Spence*: quoted twice and criticized twice.[254] The imbued test is only mentioned explicitly one time.[255]

C. Three Significant Supreme Court Variations on Spence

In the Supreme Court cases after *Spence*, three significant variations on the *Spence* test have emerged. First, the *Hurley* opinion disapproved of the requirement of a particularized message. Second, the *FAIR* case went the opposite direction and seemed to suggest that the requirement was not just for a particularized message but an "overwhelmingly apparent" one. Third, Justice Scalia has suggested a government intent test as the main way of determining when conduct was being regulated as speech. This approach was seemingly mentioned with approval in the *Johnson* case which adds to its potential importance.[256] Each will be discussed separately.

1. Hurley*'s Rejection of a Narrow View of Particularized Message*

In *Hurley*, though the primary issue of the case was not conduct as symbolic speech but whether the associational group should be classified as expressive, Justice Souter nonetheless criticized the message test of *Spence*. He said that "a narrow, succinctly articulable message"—which he seemed to equate with the *Spence* "particularized message" requirement—was not "a condition of constitutional protection."[257] The *Spence* message test was so under inclusive,

---

251. *See* City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989).

252. *See supra* note 217 and accompanying text.

253. *See infra* note 398 and accompanying text.

254. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), and *Texas v. Johnson*, 491 U.S. 397 (1984), mention the message test; *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), and *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), to a lesser degree, criticize it.

255. Only *Johnson* specifically mentions the imbued test. *Johnson*, 491 U.S. at 404.

256. *See supra* note 248 and accompanying text.

257. *Hurley*, 515 U.S. at 569.

Souter argued, that, as a test for free speech, it would not even protect such unquestioned free speech as "[a] Jackson Pollock [painting], music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll."[258] Presumptively, the fear was that the imprecise message of the association's parade in *Hurley* would not have been protected under the *Spence* test.[259]

It is hard to know what to make of this sudden unprovoked attack on the *Spence* message test. It would seem that an association could be expressive in nature even if its message was somewhat obscure. The association would be expressive even if it had published no message at all, provided it was undertaking steps to be communicative. In *Hurley*, the parade and all that it entailed, was intended to be communicative, whatever its message.[260] The Court's only later mention of the *Hurley* spin was in *Boy Scouts of America v. Dale*, when the Court said that associations did not have to have "a certain message" to be protected but "must merely engage in expressive activity that could be impaired."[261] Then, directly referencing *Hurley*, the Court stated: "For example, the purpose of the St. Patrick's Day parade in *Hurley* was not to espouse any views about sexual orientation, but we held that the parade organizers had a right to exclude certain participants nonetheless."[262] What makes *Hurley* especially important is that a number of lower courts have taken what seems to be a fairly minor point as either a modification or an outright rejection of the *Spence* message test.[263]

Justice Souter in *Hurley* seems to have objected to what he perceived to be an uncharitable appreciation of more abstract, less focused messages. It is hard to take Justice Souter's concerns very seriously or to imagine what his concern was, especially considering the context of the case—a St. Patrick's Day parade—was either primarily a party or a statement of traditional values. Of all the criticisms that could be made of the *Spence* test, its failure to appreciate abstractness would seem to be one of the least. In the context of the *Spence* case itself, the peace sign taped on an upside down flag, the Court pretty easily constructed a message of anguished concern for unjustified violence against innocent college protestors;[264] a leap of logic every bit as profound as anything in Jaberwocky ("And, hast thou slain the Jabberwock? Come to my arms, my

258. *Id.*

259. This, at least, seems to be the suggestion of the Court in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), when the Court said that the parade in *Hurley* carried no "certain message." *Id.* at 655.

260. *See Hurley*, 515 U.S. at 562.

261. *Dale*, 530 U.S. at 655.

262. *Id.*

263. *See infra* Part V.C.

264. *See supra* note 158 and accompanying text.

beamish boy!").[265] Souter's concern for the *Spence* test's under appreciation of abstractness and silly rhymes seems misplaced. Even as to *Hurley*'s examples of non-particularized speech that should be protected, "the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll,"[266] at least Jabberwocky ("Beware the Jubjub bird, and shun The frumious Bandersatch!")[267] would be pure speech. So, almost certainly, would be music[268] and likely even the abstract dribbling of Pollock.[269] There are many reasons to criticize the *Spence* message test, but the claim that it would not protect a Jackson Pollock painting seems to be a bit far-fetched. Some lower courts also claim that the *Hurley* concern would not have any application to pure speech, and that a painting should fall within any definition of pure speech.[270] The saying that a picture is worth a thousand words is not only one of our oldest clichés but a free speech truism. Whatever the point of *Hurley* was, its examples do not help very much in clarifying that opinion's concern for the *Spence* test. At best, the *Hurley* gloss has simply confused the symbolic speech discussion.

2. FAIR *Requires an "Overwhelmingly Apparent" Message*

The Court in *FAIR* seemed to give approval to a more restrictive view of the *Spence* "particularized message" language.[271] The Supreme Court in *Johnson* had referred to the expressive conduct of burning the American flag as having an "overwhelmingly apparent" message.[272] This phrase has led some lower courts to conclude that to be speech, not only must a message be "particularized," it must also be "overwhelmingly apparent."[273] This seems a serious misreading of *Johnson*, in that the Court there seemed to be just describing the dramatic nature of *Johnson*'s flag burning message, not imposing

265. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 117 (Boston, Lothrop Publishing Co. 1898) (1871), *available at* http://books.google.com/books?id=u5MNAAAAYAAJ&printsec=frontcover&dq=alice%27s+adventures+in+wonderland&as_brr=1.

266. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569 (1995).

267. CARROLL, *supra* note 265, at 126.

268. *See* Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989).

269. *See* Regan v. Time, Inc., 468 U.S. 641, 678 (1984) (Brennan, J., concurring) (noting while striking down a federal law banning the use of real money in pictures that "[t]he adage that 'one picture is worth a thousand words' reflects the common-sense understanding that illustrations are an extremely important form of expression for which there is no genuine substitute").

270. *See infra* note 412 and accompanying text.

271. *See supra* note 158 and accompanying text.

272. Texas v. Johnson, 491 U.S. 397, 406 (1989).

273. *See infra* note 419 and accompanying text.

a new message test.[274] The *Johnson* court also described the flag burning as "overtly political," but there is no suggestion that symbolic conduct is to be treated as speech only if it involves high value speech such as political speech.[275]

Nonetheless, this misreading was recently given some surprising support by the Supreme Court. In *FAIR*, the Court rejected the claim by private law schools that the law schools had a free speech right to exclude military recruiters from the schools formal placement services because of the military's discrimination against gays.[276] The Court rejected the law schools' actions as a form of speech because it said its message was not "overwhelmingly apparent."[277] Like in *Hurley*, it is hard to know what the *FAIR* Court had in mind. Since the Court rejected all of the free speech claims made in the *FAIR* case, the Court may only have been emphasizing how inadequate the speech claims were in that case.[278] On the other hand, the Court may have been signaling its dissatisfaction with the array of symbolic speech cases filed in the lower courts and suggesting a much stricter message test as a way of weeding out the more specious claims. Given that the Supreme Court must have been aware of the lower court cases viewing the *Johnson* phrase "overwhelmingly apparent" as a restrictive view on the message test, it is easy to suspect the latter. One can be certain that at least some of the lower courts will pick up on this additional implicit support for a more restrictive version of the *Spence* message test. Not only is the *FAIR* Court's use of the *Johnson* language

---

274. *See Johnson*, 491 U.S. at 406. The Court makes the comment in a discussion of the events surrounding the burning of the flag, namely the Republican renomination of President Reagan. *Id.* The Court simply observes that the burning of the flag was "overtly political" and its political message was "overwhelmingly apparent." *Id.* There is nothing in the statement that makes it appear to be a limitation of the message test. *See id.*

275. *Id.*

276. Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR), 547 U.S. 47, 70 (2006). The Court's unanimous rejection of the speech claims in *FAIR* could hardly have been more complete:

> In this case, FAIR has attempted to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect. The law schools object to having to treat military recruiters like other recruiters, but that regulation of conduct does not violate the First Amendment. To the extent that the Solomon Amendment incidentally affects expression, the law schools' effort to cast themselves as just like the schoolchildren in *Barnette*, the parade organizers in *Hurley*, and the Boy Scouts in *Dale* plainly overstates the expressive nature of their activity and the impact of the Solomon Amendment on it, while exaggerating the reach of our First Amendment precedents.

Id.

277. *Id.* at 66.

278. *Id.*

unsupported by *Johnson*, it reflects a harshness towards symbolic speech that is not justified.[279]

3. The Government Intent as a Useful Addition to the Spence *Test*

The final significant variation is Justice Scalia's emphasis on government intent as one factor in finding when expressive conduct is speech, if not the overriding factor. Justice Scalia, in a concurring opinion in *Barnes*, said that the key to finding symbolic speech was the intent of the regulation, whether the government was restricting conduct because of its message.[280] As a general proposition, he stated that the First Amendment protects expressive conduct when "the government prohibits conduct *precisely because of its communicative attributes*."[281] He distinguished between those cases where "we explicitly found that suppressing communication was the object of the regulation of conduct" and those cases "where suppression of communicative use of the conduct was merely the incidental effect of forbidding the conduct for other reasons."[282] He said the former cases raised significant free speech issues, while the latter ones raised no free speech issues.[283]

Scalia had first used this "legislative intent" or "government intent" test as a Court of Appeals judge in *Community for Creative Non-Violence v. Watt*.[284] The majority had found that sleeping in symbolic structures in a public park was protected symbolic speech.[285] With typical bluster, then-Circuit Judge Scalia called the majority's failure "flatly to deny that sleeping is or can ever be speech for First Amendment purposes" nothing less than "a commentary upon

279. Professor Kalven would say that if there is one overwhelming principle to free speech, it is that tests for free speech must be expansive in order to make sure that all speech is protected. Here, a narrow definition of symbolic speech is inconsistent with that vision. *See* Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191. A very liberal view of symbolic speech, such as some lower courts find in *Hurley*, is more protective in the short run, but may be less protective of speech in the long run in that it tends to trivialize free speech more than a balanced view of the message test such as that found in *Spence*.

280. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 577 (1991) (Scalia, J., concurring) ("In [*Eichman*, *Johnson*, *Spence*, *Tinker*, *Brown*, and *Stromberg*], we explicitly found that suppressing communication was the object of the regulation of conduct.").

281. *Id.* ("Where the government prohibits conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional.").

282. *Id.*

283. *Id.* at 577-78. Justice Scalia compared this approach to his free exercise analysis in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). *See Barnes*, 501 U.S. at 579 (Scalia, J., concurring); *see also infra* note 300.

284. 703 F.2d 586, 622-23 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd sub nom.* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984).

285. *Id.* at 599 (majority opinion).

how far judicial and scholarly discussion of this basic constitutional guarantee has strayed from common and common-sense understanding."[286] He continued:

> Specifically, what might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires. But a law proscribing conduct for a reason having nothing to do with its communicative character need only meet the ordinary minimal requirements of the equal protection clause.[287]

The majority of the Court in the *Johnson* case seemed to specifically endorse the importance of government intent; though not necessarily as passionately as Scalia himself. The *Johnson* Court stated:

> [The government] may not, however, proscribe particular conduct *because* it has expressive elements. . . . It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.[288]

Whether justified as the only test or not, Justice Scalia's government intent test is a useful addition to *Spence*'s imbued and message tests. Indeed, in some instances it may be a clearer indicator that speech is involved than either the imbued or message tests of *Spence*. Nonetheless, from the imbued test and the message test, it is often clear enough whether speech is involved without the sometimes more difficult inquiry into government intent. In *Spence* itself, we do not know if the police who saw his flag were intent on suppressing his content, concerned with a possible breach of peace, or were protecting our national symbol. In terms of the government intent test, it would also not be clear if the intent to protect our national flag would be an invalid intent, since the Court in *Eichman* held that even content-neutral attempts to protect the flag were inherently content-based.[289]

---

286. *Id.* at 622 (Scalia, J., dissenting).

287. *Id.*

288. Texas v. Johnson, 491 U.S. 397, 406-07 (1989).

289. In *Eichman*, the government had argued that the federal Flag Protection Act did "not target expressive conduct on the basis of the content of its message." United States v. Eichman, 496 U.S. 310, 315 (1990). The Court said that although the Act "contains no explicit content-based limitation," it was nonetheless clear that the government interest was "concerned with the content of such expression." *Id.*

Nonetheless, the government intent test does suggest that speech, as opposed to conduct, is involved in a number of symbolic speech cases. The *O'Brien* and *Tinker* cases are both fairly obvious examples. There was no reason for punishing the act of torching the credit card sized selective service documents in *O'Brien* or forbidding the wearing of black arm bands in *Tinker* other than to suppress the content of speech. In *O'Brien* the Court found that the law was passed for reasons unrelated to the suppression of free expression.[290] In *Tinker*, the lower court had found the rule was based upon a fear of classroom disturbance.[291] If true in both instances, an intermediate test would then be appropriate. In *O'Brien*, the Court found concern for the selective service system to pass that test.[292] In *Tinker*, the Court did not agree with the lower court and could not find any overriding real danger to disruption of the classroom atmosphere to justify the regulation.[293] In other cases, government intent, properly considered, should have led the Court not only to conclude that speech was involved, but also to conclude that the intent was to suppress the speech because of its content. The government claims of justification in both *O'Brien* and *Tinker* should have been subject to strict scrutiny, requiring some compelling state interest to outweigh the harm done to speech.

The government intent test would also indicate that the conduct in *Clark* and *Barnes* was not speech. In *Clark*, the government's purpose in barring sleeping, however misguided, seemed to be genuinely concerned about proper use of the park.[294] In the topless cases, the government had no desire to

---

290. The *O'Brien* test itself required that the regulation be "unrelated to the suppression of free expression." United States v. O'Brien, 391 U.S. 367, 377 (1968). The Court concluded that the applicable provision of the Selective Service Law "meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it." *Id.* Nonetheless, the Court in *O'Brien* refused to consider O'Brien's claim that the purpose of the law was to suppress his free speech. *Id.* at 382-83. The Court said, "We reject this argument because under settled principles the purpose of Congress, as O'Brien uses that term, is not a basis for declaring this legislation unconstitutional." *Id.* at 383.

291. The Supreme Court said that the trial court had "concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969). If true, that would have been a content-neutral reason for the ban. Based upon the facts, the Court disagreed with that conclusion. *Id.* It also found some evidence of content-based discrimination. *Id.*

292. In *O'Brien*, the Court said that purposes of requiring "Selective Service certificates establish beyond doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction." *O'Brien*, 391 U.S. at 380.

293. *Tinker*, 393 U.S. at 508.

294. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 295 (1984) ("The requirement that the regulation be content-neutral is clearly satisfied. The courts below accepted that view, and it is not disputed here that the prohibition on camping, and on sleeping

suppress any particular message or speech at all, just what it considered to be lewd behavior.[295]

One problem with the government intent test is that it overlaps both the *O'Brien* and the time, place, and manner tests in perhaps a confusing way. Both of those tests recognize that regulations of speech may be either content-based or content-neutral, with content-based regulations receiving strict scrutiny and content-neutral receiving intermediate scrutiny.[296] To use government intent to determine both when conduct is speech and what is the appropriate review level certainly invites pause. Justice Scalia in *Watt* does not help with this confusing aspect of his suggested test.[297] He said that such regulations must "be justified by the substantial showing of need that the First Amendment requires," clearly punting where perhaps some additional insight is needed.[298] Although the phrase "substantial showing" suggests an intermediate level of review, it seems more likely that he is just saying that the normal free speech test should control.[299] The fact that government intends to regulate the speech aspect of expressive conduct does not necessarily mean that the government is regulating the content or message, but it is hard to think of an instance where that is not the case.[300]

---

specifically, is content-neutral and is not being applied because of disagreement with the message presented.").

295. City of Erie v. Pap's A.M., 529 U.S. 277, 290 (2000) ("The ordinance here, like the statute in *Barnes*, is on its face a general prohibition on public nudity. By its terms, the ordinance regulates conduct alone. It does not target nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity." (citation omitted)).

296. See, for example, *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), which mentions both the time, place, and manner test and the *O'Brien* test as being intermediate tests. *Id.* at 661-62. *Turner* also said,

> Deciding whether a particular regulation is content based or content neutral is not always a simple task. We have said that the "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys."

Id. at 642 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)) (alteration and omission in original).

297. Cmty. for Creative Non-Violence v. Watt, 703 F.2d 586, 622 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd sub nom.* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984).

298. *Id.*

299. *Id.* Justice Scalia later referred to "rigorous First Amendment scrutiny." *Id.* at 626.

300. Ultimately, Scalia may be asking too much of his test, giving it more to do than is reasonable. He compares this free speech approach with his approach to the Free Exercise of Religion Clause in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). *See supra* note 283 and accompanying text. Perhaps that comparison is the most telling reason why his free speech approach may not be the panacea he claims. While this is hardly the place for a full discussion of the weaknesses of the *Smith* decision, its most

The government intent test is a useful addition to the imbued and message tests. In cases where the government is obviously trying to control the message portion of symbolic conduct, that certainly is powerful evidence that speech is involved. In instances where there is no such evidence, that lack of certainty cuts the other way. The intent test at this point does not seem so clear or easy in its application as to be the final word. As indicated, the *Spence* case itself is an example of the test's weaknesses as the sole test.[301] Without any evidence of government intent at all, both the imbued test and message test make it clear that Spence was engaged in expressive conduct entitled to protection as free speech. Nonetheless, as the majority said in *Johnson*, government intent "helps" in determining if free speech is involved.[302]

Unlike the *Hurley* and *Johnson* glosses on the *Spence* test, Scalia's emphasis on government intent in determining when expressive conduct should be protected as speech has not been a significant factor in the lower courts.[303] In the few lower court cases that have cited the case, it has been used for the proposition that content-based regulations must be strictly reviewed, not to draw the line between conduct and symbolic speech.[304]

V. Spence *and the Lower Courts*

A. The Variety of Cases

Perhaps the truest indication of the inadequate definition of symbolic speech in *Spence* and the Supreme Court's failure to address the inadequacies in the

---

glaring mistake should not be repeated in the symbolic speech arena. In *Smith*, speaking for the Court, Justice Scalia rejected the compelling state interest test for generally applicable laws which incidentally impacted religion. *Smith*, 494 U.S. at 882-84. Laws intended to regulate the free exercise of religion did get the compelling state interest test. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). The end result is that laws that incidentally hurt religion may not be accorded enough judicial scrutiny, and those that directly regulate religious practices are, perhaps, reviewed too strictly. It is not clear why a law which bans all animal killings in a particular community, and thus incidentally impacts those religious groups that believe in animal sacrifice, should be judged automatically valid, but a law directly banning animal sacrifice in religious worship is likely automatically invalid. Whether incidental or direct, surely the better approach is to fairly weigh the competing governmental and religious interests with the same heavy weight given to religious practices in both instances.

301. *See supra* note 288-89 and accompanying text.

302. See *Texas v. Johnson*, 491 U.S. 397 (1989), where the Court said that the government interest at stake "helps to determine whether a restriction on that expression is valid." *Id.* at 406-07.

303. *See supra* note 302 and accompanying text.

304. *See, e.g.*, United States v. Lee, 6 F.3d 1297 (8th Cir. 1993) (finding cross burning to be speech); Bird v. State, 908 P.2d 12 (Ariz. Ct. App. 1995) (finding no free speech right to bet on elections).

Spence test in later cases is the morass of symbolic speech litigation at the lower court level. There have been many state and lower federal court cases involving significant discussions of various versions of the *Spence* test with over 1600 cites to the *Spence* case available.[305] Many of these are a complete waste of judicial time, a waste which a little effort at the Supreme Court level in clarifying *Spence* would have, at least in part, alleviated.[306] In one federal case, the plaintiff claimed he was fired from his city job because of his symbolic protest against a city ordinance banning chickens in residential front yards.[307] The defendant city claimed the plaintiff was fired for not getting rid of the chickens in his front yard.[308] In an unpublished state case, it was asserted that a scented pine tree shaped air freshener hanging in violation of traffic laws from the rearview mirror was protected symbolic speech—"[h]is clear display of a pine tree air freshener serves as a statement to the public about both the aromatic quality of his vehicle's interior, and an aesthetic expression of his appreciation for nature."[309] In one of the more questionable claims of free speech, one plaintiff claimed that by engaging in group acts of sex in a social club "they were expressing their love for and trust in their partners and their belief in a sexually liberated society."[310] In determining that no message was communicated, the court referred to the extensive depositions taken in the case, among which was the following exchange which made it clear that not all participants got the same message:

> Q: Have you ever seen two people have sexual intercourse on the club premises while the club was open to the public?

---

305. There are also over 4500 lower court citations to *Johnson*, many of them involving some type of symbolic speech without any reference to *Spence* at all, and some of them stating the *Spence* test without even citing *Spence*. *See, e.g.*, Klein v. Perry, 216 F.3d 571, 575 (7th Cir. 2000); Bailey v. Morales, 190 F.3d 320, 325 (5th Cir. 1999); Cunningham v. New Jersey, 452 F. Supp. 2d 591, 595 (D.N.J. 2006). Indeed, even the Supreme Court forgets *Spence* on occasion. In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) and *Virginia v. Black*, 538 U.S. 343 (2003), both involving the burning of a cross as a form of symbolic speech, and *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), like *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), involving nude dancing, there is not a single mention of the *Spence* case, though there is a reference to conduct sometimes being protected as speech.

306. Karr v. Schmidt, 460 F.2d 609, 610 (5th Cir. 1972) ("This is another of the multitude of lawsuits which have recently inundated the federal courts attacking hair length regulations promulgated by local public school authorities.").

307. Cabrol v. Town of Youngsville, 106 F.3d 101, 108 (5th Cir. 1997).

308. *Id.*

309. State v. Green, No. A04-1657, 2005 WL 2008521, at *2 (Minn. Ct. App. Aug. 23, 2005) (alteration in original).

310. Recreational Devs. of Phoenix, Inc. v. City of Phoenix, 83 F. Supp. 2d 1072, 1090 (D. Ariz. 1999).

A: Yes.

Q: Do you recall if you heard any message coming from them at that time?

A: You mean like moaning?

Q: That. Anything?

A: Sure. Lots of moaning.[311]

Typical of the wasted judicial time in considering free speech claims in cases not appearing to involve any free speech issues are the dress code cases.[312] A number of cases have involved challenges to public school dress codes as contrary to the free expression rights of students to wear whatever they wanted. While the circuits do not appear to be exactly split, some are more sympathetic to the free speech claims of student dress than others. The Sixth Circuit, despite applying a speech friendly version of *Spence* as modified by *Hurley*, found that a student's refusal to abide by a school dress code because she preferred clothing that she looked good in did not raise free speech issues.[313] Nonetheless, because of the student's overbreadth claim, the Court then assumed some free speech and found that the *O'Brien* test justified the regulation.[314] The Fifth Circuit found many types of communicative aspects to

311. *Id.*

312. Equally wasteful of judicial resources, there have been an almost amazing number of cases involving the claim of sports activity as protected speech. In a case involving a ban on even the in-home possession of nunchaku as a weapon, but viewed primarily as a martial arts case, the court in *Maloney v. Cuomo*, 470 F. Supp. 2d 205 (E.D.N.Y. 2007), concluded broadly in its tracing of lower federal and state court cases that no free speech protection was given to sports or athletics. *Id.* at 213; *see also* Justice v. Nat'l Collegiate Athletic Ass'n, 577 F. Supp. 356, 374 (D. Ariz. 1983) (not football); MacDonald v. Newsome, 437 F. Supp. 796, 798 (E.D.N.C. 1977) (not surfing); Murdock v. City of Jacksonville, 361 F. Supp. 1083, 1095-96 (M.D. Fla. 1973) (not wrestling); Sunset Amusement Co. v. Bd. of Police Comm'rs of the City of Los Angeles, 496 P.2d 840, 845-46 (Cal. 1972) (not roller skating); Top Rank, Inc. v. Fla. State Boxing Comm'n, 837 So. 2d 496, 498 (Fla. Dist. Ct. App. 2003) (not boxing). *But see* Post Newsweek Stations-Conn., Inc. v. Travelers Ins. Co., 510 F. Supp. 81, 86 (D. Conn. 1981) (stating that world-class figure skating, as a form of entertainment, was "on the periphery of protected speech"). The court did not say that martial arts could never be protected speech, just that the plaintiff had only asserted an interest related to physical activity. *Maloney*, 470 F. Supp. 2d at 213.

313. Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381 (6th Cir. 2005); *accord In re* Julio L., 990 P.2d 683 (Ariz. Ct. App. 1999), *vacated*, 3 P.3d 383 (Ariz. 2000).

314. *Blau*, 401 F.3d at 389-91. The *Blau* court said that although

> the Blaus may not bring a First Amendment challenge on their own behalf, it does not end the matter. In the context of First Amendment challenges, unlike most areas of constitutional litigation, a claimant may seek protection not only on her own behalf but on behalf of others as well.

Id. at 390. It did, however, caution that "[t]he ability to raise this kind of [overbreadth] challenge . . . is one thing; the ability to win it is another." *Id.* at 391. After stating and

student dress, but ultimately would only assume that free speech was involved.[315] The circuit court then applied *O'Brien* and found no free speech rights were violated.[316] A variation on the theme was the unsuccessful challenge to a Florida school district rule limiting pierced jewelry to the ears by a student who, according to her, "[a]s a form of expression" had "piercings located on her tongue, nasal septum, lip, naval, and chest."[317]

One of the results of too easily finding speech from questionable conduct is that the courts tend too easily to find that the speech is not protected. The end result is a precedent that can be used in other cases in ways not sympathetic to

---

applying the *O'Brien* test, the court concluded that "[i]n the end, the school district has satisfied all three prongs of the *O'Brien* test." *Id.* at 392. See *supra* note 124 for a discussion of the *Blau* three-prong *O'Brien* test.

315. Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 441 (5th Cir. 2001). *Canady* is an interesting case in that the Fifth Circuit so carefully considered the various ways that clothing might be communicative. *Id.* at 439-41. The court even parsed two Supreme Court decisions. Examining *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the court found no support for speech. *Canady*, 240 F.3d at 440 n.1 ("'The problem posed by the present case [symbolic black arm bands] does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. . . .'" (quoting *Tinker*, 393 U.S. at 507-08) (omission in original)). But, in examining *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), the court found support for clothing being expressive. *Canady*, 240 F.3d 440 n.2 (stating that "the airport regulation prohibited 'talking and reading, or the wearing of campaign buttons and symbolic clothing'" (quoting *Jews for Jesus, Inc.*, 482 U.S. at 575)). The *Canady* court reviewed different kinds of messages that clothing might communicate, saying, "A person's choice of clothing is infused with intentional expression on many levels." *Id.* at 440. As examples of what it called pure speech, it mentioned items such as "shirts or jackets with written messages supporting political candidates or important social issues." *Id.* Also protected were items which "may also symbolize ethnic heritage, religious beliefs, and political and social views" which were protected "if the message is likely to be understood by those intended to view it." *Id.* at 440-41. In addition, students may "choose their attire with the intent to signify the social group to which they belong, their participation in different activities, and their general attitudes toward society and the school environment" which though of little meaning to adults might be of some importance to "a young person's social development." *Id.* at 441. The court was less certain that the latter was communicative, but was unwilling to say that it never was. *Id.*; *see also* Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275 (5th Cir. 2001) (holding that student's First Amendment free speech rights not violated by school's uniform policy, even assuming that it regulated expressive conduct that was entitled constitutional protection).

316. *Canady*, 240 F.3d at 443-44. In another personal appearance case, *Miller v. Unified School District No. 437*, No. 84-4203, 1988 WL 212550 (D. Kan. May 25, 1988), the plaintiff contended that he was denied a job as a custodian because of his long hair and beard in violation of his free speech rights. The district court, citing a string of similar federal court cases, concluded: "The wearing of long hair and a beard is so ambiguous as to put them outside the purview of the First Amendment." *Id.* at *3.

317. Bar-Navon v. Sch. Bd. of Brevard County, Fla., No. 6:06-cv-1434-Orl-19KRS, 2007 WL 121342, at *1 (M.D. Fla. Jan. 11, 2007). Presumptively, this list is not exhaustive.

free speech rights. The same thing happens when the court just assumes without specifically holding that free speech is involved.[318] This "fails anyway" approach[319] would seem almost invariably to lead to less than thorough applications of the free speech test. One perfect example was out of the Fifth Circuit.[320] There, the court assumed without deciding that "a hair style is a constitutionally protected mode of expression" at a public school.[321] The Court then concluded that school authorities had a compelling interest in restricting the "Beatle" style hair style.[322] Whatever the justifications there might be for a hair code in a public school, it is hard to believe that there would be any compelling state interest for such a rule.[323] If regulating the length of hair is a compelling state interest, it is hard to imagine what other state interest in some other free speech case would not pass the same test.[324]

In other situations, the lower courts may have too easily concluded that certain conduct was not speech and given inadequate protection to activity closely connected to speech or to alternative forms of speech. For example, it seemed too easy for the South Carolina Supreme Court to find that the act of tattooing was not artistic expression.[325] That court held, "Unlike burning the flag, the process of injecting dye to create the tattoo is not sufficiently communicative to warrant protections and outweigh the risks to public safety."[326] The court was trying to distinguish between the act of the tattoo

---

318. By this same logic, the same weak free speech analysis might occur in those instances where the court finds that a law is overbroad and allows someone involved with borderline protected speech to litigate the right as it might be applied to someone with clearly protected speech.

319. *See* Magid, *supra* note 29, at 473.

320. Ferrell v. Dallas Indep. Sch. Dist., 392 F.2d 697 (5th Cir. 1968).

321. *Id.* at 702 ("We shall assume, though we do not decide, for the purpose of this opinion that a hair style is a constitutionally protected mode of expression.").

322. *Id.* at 703-04.

323. The court's own explanation does not inspire confidence. *Id.* at 703 ("The compelling reason for the State infringement with which we deal is obvious. The interest of the state in maintaining an effective and efficient school system is of paramount importance.").

324. The Ninth Circuit did no favors for the First Amendment in their weak application of the *O'Brien* test in *Vlasak v. Superior Court of California ex rel. County of Los Angeles*, 329 F.3d 683 (9th Cir. 2003). The Vlasaks were cited for carrying "a bull hook—a large piece of wood with a metal hook on the end—as an example of a training device used to gain elephants' obedience" in protest of a circus act at a state community college. *Id.* at 686. The court found the bull hook to be communicative, but upheld their conviction for violating a Los Angeles city code banning large pieces of wood in public demonstrations. *Id.* at 690-91. It found that such a ban "easily satisfie[d] the *O'Brien* test." *Id.* at 691. Whatever the reasons for the city code, it would seem to have little application to the use of the bull hook in *Vlasak*.

325. State v. White, 560 S.E.2d 420 (S.C. 2002).

326. *Id.* at 423.

artist in applying the tattoo and any message contained within the body art.[327] As an earlier case had said, "the threshold and crucial issue in this case is whether the actual process of tattooing, as opposed to the image conveyed by the tattoo itself, is 'sufficiently imbued with elements of communication . . . .'"[328] While the line between the process and the message may be valid, it also seems that the two are so closely connected that both might be protected as speech. The fact that few regulations of tattoos seem to involve any concern for the message—"I love Mom" and "Nazis rock" are treated equally—might be evidence that no speech is involved, but that should not be conclusive. Another curious case out of the lower federal courts concluded that there were no communicative aspects to a teacher showing an R-rated movie contrary to school rules.[329] As the court saw it, though the movie was obviously communicative, the teacher's decision to show it while doing administrative chores was not.[330] Excluding a teacher's choice to show a movie because the teacher was trying to occupy student time seems a flimsy ground for determining when a classroom movie is free speech.

B. The Lower Courts' Application of the Spence *Tests*

From the lower courts four trends emerge. First, the imbued test is seldom applied and is conclusive only when the free speech issue is clear. Second, the

---

327. *Id.*

328. Yurkew v. Sinclair, 495 F. Supp. 1248, 1253 (D. Minn. 1980) (quoting Spence v. Washington, 418 U.S. 405, 409-10 (1974)) (footnote omitted), *aff'd*, 657 F.2d 274 (8th Cir. 1981) (mem.).

329. Fowler v. Bd. of Educ. of Lincoln County, Ky., 819 F.2d 657 (6th Cir. 1987). Similar in reasoning is *Cockrel v. Shelby County School District*, 81 F. Supp. 2d 771 (E.D. Ky. 2000), which found that a fifth grade teacher's segment on the virtues of industrial hemp, highlighted by a presentation of actor Woody Harrelson, was not speech. The court concluded:

> Plaintiff's conduct is not free speech. The fact that at some point during or after the presentation Plaintiff may have developed an approval or disapproval of the use of industrial hemp, does not, standing alone, provide a sufficient basis for the conclusion that her conduct was a "form of expression entitled to protection under the First Amendment."

Id. at 776 (citing *Fowler*, 819 F.2d at 663). Also similar in logic is *Mercer v. Harr*, No. Civ.A. H-04-3454, 2005 WL 1828581 (S.D. Tex. Aug. 2, 2005), involving a twelve-year-old's t-shirt reading, "Somebody Went to HOOVER DAM And All I Got Was This 'DAM' Shirt," which was deemed inappropriate for public school. *Id.* at *1. The court said that no speech was involved under "the message test" because it concluded: "The right asserted is not the right to express a particularized message of fondness for the Hoover Dam. Rather, the right asserted is Heather's right to wear to school clothing that she and her family choose." *Id.* at *6.

330. *Fowler*, 819 F.2d at 664 ("In the present case, because plaintiff's conduct in having the movie shown cannot be considered expressive or communicative, under the circumstances presented, the protection of the First Amendment is not implicated.").

message test is the overwhelming test, but it is not a high threshold, and its application yields little consistency. Third, the overbreadth doctrine combined with the ambiguity of the message test contributes to unnecessary discussions of the free speech issue. Fourth, if the expressive conduct is borderline speech, virtually any state interest will pass the *O'Brien* intermediate test.

First, the imbued test has only been applied by a few courts.[331] The Court in *Spence* said that it was "necessary" to determine if expressive conduct "was sufficiently imbued with elements of communication" to be considered speech.[332] Except for those courts that view *Hurley* as having changed the message test,[333] the imbued test is usually only applied when the free speech issue is almost a foregone conclusion. Though often quoted as part of the *Spence* test, in most instances courts will almost invariably turn to the message test. When the imbued test is actually applied, it almost certainly means that the lower court is confident that the expressive conduct is speech or is not speech. Generally, the court will not need to use the message test to clarify the issue. That is not to say that the court is correct in its decision, just that it is confident of the result.[334] In the few lower court cases relying on the imbued test, two found the process of tattooing not speech.[335] Once the court could separate the process from the message, it had no qualms in finding that the process was not imbued with a communicative impact. The court in *Pinette* said the Ku Klux

331. A few of the courts mention both tests and apply mainly the imbued test. The South Carolina Supreme Court mentioned both tests and then applied mainly the imbued test, concluding that the process of tattooing was not sufficiently imbued with communicative aspects. *White*, 560 S.E.2d at 537, 539; *see also* City of Cincinnati v. Thompson, 643 N.E.2d 1157, 1163 (Ohio Ct. App. 1994) (per curiam) (holding that defendants' conduct which led to their arrest was "sufficiently imbued with communicative elements to constitute expressive conduct"). Some courts mention only the imbued test. The Sixth Circuit did not mention the message test and applied only the imbued test in *Pinette v. Capitol Square Review & Advisory Board*, 30 F.3d 675, 678-79 (6th Cir. 1994), *aff'd*, 515 U.S. 753 (1995); *see also* Karr v. Schmidt, 460 F.2d 609, 613 (5th Cir. 1972) (rejecting a public school student's claim of First Amendment protection for his right to have long hair at school; although not mentioning *Spence* or either of its tests, the court relied on an imbued type of rationale); *In re* Joshua H., 17 Cal. Rptr. 2d 291 (Cal. Ct. App. 1993) (finding that a hate crime law protecting sexual orientation raised no free speech issues). In *People v. Payne*, 565 N.Y.S.2d 389 (N.Y. City Crim. Ct. 1990), the court mentioned only the imbued test in finding a burning American flag fairly obvious symbolic speech.

332. Spence v. Washington, 418 U.S. 405, 409 (1974).

333. The lower court's treatment of *Hurley* is discussed *infra* in note 391 and accompanying text. As discussed there, at least one circuit views *Hurley* as having eliminated the message test in favor of just the imbued test.

334. In *Kalke v. City of New York*, 666 N.Y.S.2d 631 (N.Y. App. Div. 1997), the court applied only the imbued test in concluding that the distribution of condoms in a public park in the context of AIDS awareness was imbued with communicative elements. *Id.*

335. Yurkew v. Sinclair, 495 F. Supp. 1248 (D. Minn. 1980); *White*, 560 S.E.2d 420.

Klan's cross in a public forum was "entitled to the full protection of the public forum doctrine, even though it seeks to erect a cross rather than sponsor a speech."[336] That a cross was obviously symbolic speech meant that in applying *Spence*, the court only had to state: "The Constitution protects any conduct that may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'"[337] In a state case involving whether a juvenile was engaged in "seriously disruptive behavior" in a public school, the juvenile claimed that some of his misbehavior was protected by the First Amendment.[338] It was easy for the court to reject the free speech claim. The court said that not wearing the required uniform because it was not clean and because he "was just having a bad morning all around" was not speech.[339] After mentioning the symbolic conduct in *Spence*, *Tinker*, and *Brown*, the court said that "intentional misbehavior is not similarly 'imbued with elements of communication.'"[340] The court concluded: "The Constitution does not shield [the] juvenile's arbitrary decision to disobey school authorities."[341]

In another lower court case, city law prevented public nudity, but it specifically exempted "forms of expression and the communication of ideas, such as theatrical appearances."[342] The plaintiff offered free nipple piercings if done in the public front window.[343] When prosecuted for the public piercing of a female, the shop owner claimed that the public nipple piercing was symbolic speech, including artistic impression and educating the public about nipple piercing.[344] The court stated the message test, but relied exclusively on the imbued test.[345] The court held: "We do not believe that exposing the female body this way for this purpose is an artistic, dramatic, or educational form of expression entitled to First Amendment protection. We agree with other jurisdictions that the *process* of piercing the nipple is not itself

336. *Pinette*, 30 F.3d at 678.

337. *Id.* at 678 (quoting *Spence*, 418 U.S. at 409). See also *People v. Payne*, 565 N.Y.S.2d 389 (N.Y. City Crim. Ct. 1990), where the court mentioned only the imbued test in finding a burning American flag symbolic speech. *Id.* at 389. In the case, Payne was charged with having an improper fire, a burning American flag, "upon any land or wharf property within the jurisdiction of the City of New York." *Id.* In *City of Cincinnati v. Thompson*, 643 N.E.2d 1157, 1161-63 (Ohio Ct. App. 1994), the court applied primarily the imbued test in finding that an abortion protest on private property was symbolic speech.

338. *In re* Julio L., 990 P.2d 683, 684, 686 (Ariz. Ct. App. 1999), *vacated*, 3 P.3d 383 (Ariz. 2000).

339. *Id.* at 684, 686.

340. *Id.* at 686 (quoting *Spence*, 418 U.S. at 409).

341. *Id.*

342. City of Albuquerque v. Sachs, 92 P.3d 24, 29 (N.M. Ct. App. 2004).

343. *Id.* at 26.

344. *Id.* at 30.

345. *Id.*

communicative."[346] In those courts applying just the imbued test, the context, environment, and nature of the conduct—though not often applied—are part of the test.[347]

Second, the message test is by far the most common test applied by the lower courts.[348] Many of the lower courts also look to the consideration of nature,

346. *Id.*

347. *See, e.g.*, Pro v. Donatucci, 81 F.3d 1283, 1294 (3d Cir. 1996) (citing Troster v. Pa. State Dep't of Corr., 65 F.3d 1086, 1090 (3d Cir. 1995)).

348. Some of the courts will mention the imbued test, but apply only the message test. In other instances, the court will mention only the message test. In all of the following representative cases the lower court stated the full test, but discussed only the message portion. Nordyke v. King, 319 F.3d 1185, 1189-90 (9th Cir. 2003) (ordinance banning firearms on county property was not on its face a violation of free speech rights); IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 391-92 (4th Cir. 1993) (fraternity's "ugly woman contest" found to be protected expressive activity); Steirer *ex rel.* Steirer v. Bethlehem Area Sch. Dist., 987 F.2d 989, 995-97 (3d Cir. 1993) (rejecting the claim that a mandatory sixty hours of community service as a graduation requirement at a public high school was compelled speech, finding no speech at all), *abrogated by* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995), *as recognized in Troster*, 65 F.3d at 1087; Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency, 311 F. Supp. 2d 972, 1004-05 (D. Nev. 2004) (finding that a Scenic Review Ordinance regulating "the size, color, appearance, visibility, and other aspects of residential housing" did not impact free speech rights); McClure v. Ashcroft, No. Civ.A.01-2573, 2002 WL 188410, at *3-4 (E.D. La. Feb. 1, 2002) (ecstasy enhancing items at rock concerts found to be speech), *vacated*, 335 F.3d 404 (5th Cir. 2003); Missouri *ex rel.* Mo. Highway & Transp. Comm'n v. Cuffley, 927 F. Supp. 1248, 1254-58 (E.D. Mo. 1996) (Ku Klux Klan application to participate in the state's Adopt-A-Highway maintenance program a form of speech), *vacated*, 112 F.3d 1332 (8th Cir. 1997); Hernandez v. Superintendent, Fredericksburg-Rappahannock Joint Sec. Ctr., 800 F. Supp. 1344, 1349-51 (E.D. Va. 1992) (Ku Klux Klan detachable mask not categorized as speech entitled to First Amendment protection); *see also* Zalewska v. County of Sullivan, N.Y., 316 F.3d 314, 319-20 (2d Cir. 2003); Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 158-64, 177 (3d Cir. 2002); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 283-86, 295-97 (5th Cir. 2001); *Troster*, 65 F.3d at 1087-97; Cmty. for Creative Non-Violence v. Watt, 703 F.2d 586, 592-94 (D.C. Cir. 1983), *rev'd sub nom.* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984); Royal v. Super. Ct. of N.H., 397 F. Supp. 260, 262-64 (D.N.H. 1975); Dayton v. Esrati, 707 N.E.2d 1140, 1144-47 (Ohio Ct. App. 1997). In the following cases, the court mentioned only the message test. Recreational Devs. of Phoenix, Inc. v. City of Phoenix, 83 F. Supp. 2d 1072, 1089-92 (D. Ariz. 1999) (holding that a social sex club carried no particularized message); *see also* Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 440-41 (5th Cir. 2001) (assuming that school dress was communicative); United States v. Cary, 897 F.2d 917, 921-25 (8th Cir. 1990) (like *Spence*, involving the peace symbol on a flag), *vacated*, 498 U.S. 916 (1990). In *Neinast v. Board of Trustees of the Columbus Metropolitan Library*, 190 F. Supp. 2d 1040 (S.D. Ohio 2002), the court applied the message test and found no particularized message in going barefoot in a public library. *Id.* at 1045. The district court in *Crown Central Petroleum Corp. v. Waldman*, 486 F. Supp. 759 (M.D. Pa. 1980), found concerted action by independent service stations in protest of government policy to be protected by free speech and immune from federal antitrust laws.

context, and environment in determining the message test.[349] There is no definitive pattern in this great array of cases, but the message test, though not always satisfied, is not a high threshold test.[350] This is true even though many of the courts note that the burden of proof is on the person claiming that the expressive conduct is speech.[351]

In all but the most specious of free speech claims, the courts tend to find the requisite message. In an unreported case, the U.S. Attorney General had negotiated a plea agreement whereby the concert promoter would ban the use of, among other similar things, pacifiers, glow sticks, and Vick's Vapor Rub at rock concerts; a ban that local rock bands claimed violated their free speech

---

349. *See, e.g.*, *Tenafly*, 309 F.3d 144 (attachments to utility poles to create a ceremonial area related to the Sabbath not symbolic speech); Cabrol v. Town of Youngsville, 106 F.3d 101 (5th Cir. 1997) (refusing to remove cockfighting chickens from yard of home not found to be speech); *Troster*, 65 F.3d 1086 (American flag patch on work uniform not compelled speech); Univ. of Utah Students Against Apartheid v. Peterson, 649 F. Supp. 1200, 1204 (D. Utah 1986) (erection of shanties on university campus to protest South Africa apartheid found to be symbolic speech); *Waldman*, 486 F. Supp. 759 (acting in concert with other service station dealers for a three-day protest protected speech, not an antitrust violation); *see also* Monroe v. State Court of Fulton County, 739 F.2d 568 (11th Cir. 1984). The court in *IOTA XI Chapter* expressed the point using apparently synonymous terms saying that "the intent to convey a message can be inferred from the conduct and the circumstances surrounding it." 993 F.2d at 392. The court in *Villegas v. City of Gilroy*, 484 F.3d 1136 (9th Cir. 2007), *reh'g granted sub nom.* Villegas v. Gilroy Garlic Festival Ass'n, 503 F.3d 974 (9th Cir. 2007), found no communicative aspect to motorcycle club symbols, a skull with wings on both sides and a top hat. Though seemingly innocuous, such symbols were barred by city authorities at the famed Gilroy Garlic Festival. *Id*. at 1138. Though the court does not mention it, this may have been out of fear of a reoccurrence of the historic motorcycle riots in nearby Hollister, CA. (These riots occurred in 1947 and were popularized in the movie *The Wild Ones* starring Marlon Brando.) The court mentioned only context, concluding, "The plaintiffs attended an annual festival centered around garlic that offered many varieties of food and entertainment in a family-friendly atmosphere. Nothing about the festival would tend to give any further meaning to the plaintiffs' act of wearing their vests and common insignia." *Id*. at 1140. The en banc rehearing by the Ninth Circuit was granted September 17, 2007, and was not available at the time of this article.

350. But see *Pro*, where the court called the message test "a relatively high standard for communicative conduct." 81 F.3d at 1294; *see also* Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 388 (6th Cir. 2005) (stating "[t]he threshold is not a difficult one, as 'a narrow, succinctly articulable message is not a condition of constitutional protection'" (quoting Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston, 515 U.S. 557, 569 (1995))).

351. Typical is *Blau*, finding the burden was not met in a challenge to a school dress code. *Blau*, 401 F.3d at 389 ("Under these circumstances, the Blaus have not met their burden of showing that the First Amendment protects Amanda's conduct—which in this instance amounts to nothing more than a generalized and vague desire to express her middle-school individuality.").

rights.[352] Apparently, the forbidden items were used to enhance or address various aspects of the ingestion of ecstasy.[353] The court concluded that "any number of messages (freedom, identity with a certain culture) and any number of emotions" were intended to be communicated and likely to be understood by their audience, and thus free speech rights were violated.[354] In another case, the court found that denying the Ku Klux Klan the right to participate in the state's Adopt-A-Highway maintenance program interfered with the Klan's message, a message likely to be understood by highway drivers: "Specifically, the Court finds that the message intended to be conveyed by the participants is that they are environmentally-conscious and altruistic contributors to their community."[355] And in one of the low points for the message test, the Fourth Circuit found that a fraternity "ugly woman contest" was protected expressive activity.[356]

In one of the more intriguing cases, the court undertook a careful analysis of the factual detail in determining whether a state law making it a felony to wear a mask in public violated the free speech rights of a Ku Klux Klan member to wear his full Klan regalia, including a mask.[357] The court concluded that because the mask was separately attached with snaps, it was not part of the symbolic costume.[358] While it was clear that the "white robes and hood symbolized the Klan's beliefs and were likely to be so understood by those who viewed them," the mask was "an optional accessory" which "contributes nothing to the message already conveyed."[359] Had the mask been non-detachable, the court observed, the factual record for *Spence* might be different, but the court understandably could not resist punning, "Of course, a pair of scissors might suffice to cut the heart out of this argument."[360] Another court found an attached hood to be protected speech.[361]

---

352. *McClure*, 2002 WL 188410, at *1.

353. *Id.* at *1.

354. *Id.* at *4.

355. Missouri *ex rel.* Mo. Highway & Transp. Comm'n v. Cuffley, 927 F. Supp. 1248, 1254-55 (E.D. Mo. 1996), *vacated*, 112 F.3d 1332 (8th Cir. 1997); *accord* Knights of Ku Klux Klan v. Ark. State Highway & Transp. Dep't, 807 F. Supp. 1427 (W.D. Ark. 1992).

356. IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 390-91 (4th Cir. 1993).

357. Hernandez v. Superintendent, Fredericksburg-Rappahannock Joint Sec. Ctr., 800 F. Supp. 1344, 1348-51 (E.D. Va. 1992).

358. *Id.* at 1347, 1351.

359. *Id.* at 1351.

360. *Id.* at 1352 n.15.

361. Church of the Am. Knights of the Ku Klux Klan v. City of Erie, 99 F. Supp. 2d 583 (W.D. Pa. 2000).

There are an equal number of bizarre cases where the lower court concluded that no message was involved. In one case, the court concluded that a Lake Tahoe Scenic Review Ordinance regulating "the size, color, appearance, visibility, and other aspects of residential housing" did not impact free speech rights.[362] It concluded, "Plaintiff has failed to either allege in its complaint or make an argument in its opposition that the color, design, visibility, size, or shape of a home constitutes expression worthy of First Amendment protection."[363] In another case, the court rejected the claim that a mandatory sixty hours of community service as a graduation requirement at a public high school was compelled speech, finding no speech at all.[364] Further, the Ninth Circuit concluded that a local ordinance banning firearms on county property was not, on its face, a violation of free speech rights, but its conclusion held open the possibility that some uses of a gun might be speech, such as waiving a gun at an anti-gun rally.[365]

While clearly not all claims of symbolic speech pass the message test, the threshold does not seem so high as to be threatening of most free speech rights. More importantly, one is hard put to see the dividing line between those things found to have a message and those with no message. This leads to inconsistent results, but usually with anything remotely connected to speech being treated as speech or at least assumed to be speech. Nonetheless, the fact that the court in some of these cases must undertake such a complete factual analysis—and that the participants engage in extensive pretrial discovery—would indicate that some greater clarity as to what expressive conduct should be treated as speech is needed. If speech is involved, requiring extensive discovery is inconsistent with the need to protect speech. Just the expense of proving that speech was involved would be a disincentive. On the other hand, if no speech is involved, the full cost of litigating such trivial issues would seem astounding.

Third, the free speech overbreadth doctrine contributes to unnecessary discussions of the free speech issue. Even in cases where the court is convinced that the party before it raised no valid free speech issue, the court has, pursuant to the overbreadth doctrine, gone on to apply the message test as to how the law might be applied to others.[366] Overbreadth is a unique free speech doctrine

362. Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency, 311 F. Supp. 2d 972, 975, 1005 (D. Nev. 2004).

363. *Id.* at 1005.

364. Steirer *ex rel.* Steirer v. Bethlehem Area Sch. Dist., 987 F.2d 989 (3d Cir. 1993), *abrogated by* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995), *as recognized in* Troster v. Pa. State Dep't of Corr., 65 F.3d 1086, 1087 (3d Cir. 1995).

365. Nordyke v. King, 319 F.3d 1185, 1190 (9th Cir. 2003).

366. Typical is *Blau*, where the court totally rejected any free speech claim concerning the plaintiff's challenge to a school dress code. Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 390 (6th Cir. 2005). The court called the student's free speech claim, "nothing more than a

which allows a person not engaged in protected free speech to litigate the law as it might be applied to someone engaged in protected free speech. The logic is that the law, just on the books, chills free speech rights, and thus the person it is applied to, even if not engaged in protected speech, can challenge the law on its face as it might be applied to others. In *Schad v. Borough of Mount Ephraim*, the Court found that a nude behind a coin operated curtain could litigate a city law banning "live entertainment."[367] The Court said,

> Because appellants' claims are rooted in the First Amendment, they are entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own. "Because overbroad laws, like vague ones, deter privileged activit[ies], our cases firmly establish appellant's standing to raise an overbreadth challenge."[368]

Whether the nude in a box was protected speech or not was of no importance. Because of the overbreadth doctrine, the nude in the box would get to litigate the law as it might be applied to a production of Shakespeare.[369]

The overbreadth doctrine is especially problematic in symbolic speech cases in that it allows the court to avoid saying whether the particular conduct is speech or not. It is enough that the law might be applied to what might be free speech. Using the doctrine, courts have avoided deciding whether particular expressive conduct is speech or not because even if not speech, the law might later be applied against free speech. In one case, a self-proclaimed "horseman evangelist" decided to ride his horse through a gay rights gathering in order to express his belief that homosexuality was immoral and perverse.[370] The court found that the conduct was protected, but in large part because of the overbreadth of the applicable law which the court thought might criminalize an aggressive coach's half time speech.[371] Also the court asked: "Finally, what about the law professor using the Socratic method who calls on a first-year

---

generalized and vague desire to express her middle-school individuality." *Id.* at 389. The court even said that her attempt to fit "within this line of cases [*Barnette*, *Tinker*, *O'Brien*, and *Spence*] gives the invocation of precedent a bad name." *Id.* The court then found that, though the Blaus' could not bring a free speech challenge on their own behalf, "[i]n the context of First Amendment challenges, unlike most areas of constitutional litigation, a claimant may seek protection not only on her own behalf but on behalf of others as well." *Id.* at 390.

367. 452 U.S. 61, 66 (1981).

368. *Id.* at 66 (quoting Grayned v. City of Rockford, 408 U.S. 104, 114 (1972)) (alteration in original).

369. Or any other protected speech. "Because appellants' claims are rooted in the First Amendment, they are entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own." *Id.*

370. State v. Machholz, 574 N.W.2d 415 (Minn. 1998).

371. *Id.* at 420-21.

student, drills the student for the entire class, and ridicules the student when he falters?"[372]

Lower courts seem to be more sympathetic to overbreadth claims than does the Supreme Court. In some cases where the primary conduct is rejected as being speech, the lower court will nonetheless undertake a free speech analysis because the law might be used in other cases to restrict expressive conduct that is speech.[373] The Supreme Court in *Broadrick v. Oklahoma* seemed especially cautious in applying overbreadth in cases involving a mixture of speech and nonspeech.[374] The Court in *Broadrick* said that when an enactment is directed at conduct rather than at speech, "overbreadth scrutiny has generally been somewhat less rigid" so long as the statute regulates the conduct in a "neutral, noncensorial manner."[375] The Court said, "[T]he overbreadth of [such] a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[376]

A more restrictive application of the overbreadth doctrine to symbolic speech cases might indicate a lesser protection for symbolic speech as opposed to pure speech, similar to *Johnson*'s statement that courts have a freer hand in regulating symbolic speech than pure speech. That does not appear to be the

---

372. *Id.* at 421. The lower courts do not always accept the overbreadth claim. The court in *Binkowski v. State*, 731 A.2d 64, 77 (N.J. Super. Ct. App. Div. 1999), could not find facially invalid on free speech grounds the state Hunter Harassment Statute, which criminalized "hindering or preventing" lawful hunting practices. Also rejecting an overbreadth challenge was *State v. Stevenson*, 613 N.W.2d 90 (Wis. 2000). The court found that the defendant's "conduct of surreptitiously videotaping his former girlfriend in the nude [was] abhorrent and that such conduct [was] given no protection under the First Amendment." *Id.* at 94. However, noting that under the overbreadth doctrine, the law still might be invalid if it could be read as criminalizing things such as:

> (1) Titian's "Venus of Urbino," a 1528 painting of a female nude reproduced by the Yale University Press; (2) a 1927 Imogen Cunningham photograph of a nude female torso featured in Forbes magazine; (3) the New York Times publication of a Pulitzer Prize winning photograph that depicts a Vietnamese girl running nude following a napalm attack; and (4) a political cartoon appearing in Penthouse magazine portraying Kenneth Starr along with partially clad Monica Lewinsky and Linda Tripp.

Id. at 94-95.

373. *See, e.g.*, Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 389-91 (6th Cir. 2005); State v. Poe, 88 P.3d 704, 711 (Idaho 2004). Additionally, see *State v. Bouye*, 484 S.E.2d 461, 464 (S.C. 1997), which discussed overbreadth even though it said, "The overbreadth doctrine is considered one of last resort and should be used sparingly, especially where the statute in question is primarily meant to regulate conduct and not merely pure speech." *Id.* at 464 (internal quotation marks omitted).

374. *See* Broadrick v. Oklahoma, 413 U.S. 601, 613-15 (1973).

375. *Id.* at 614-15.

376. *Id.* at 615.

case. First, the Supreme Court has not limited the *Broadrick* requirement of substantial overbreadth to cases involving symbolic speech.[377] Second, expressive conduct cases do seem to call for a more restrictive application of the overbreadth issue. Courts should not apply the overbreadth approach unless the person raising the issue is at least arguably engaged in speech. If the person raising free speech claims has no free speech issues, there will be no facts that help focus the issues. The court will have compounded the ambiguity of the *Spence* test with the ambiguity of considering all possible applications of the law to unknown persons, unknown symbols, and unknowable messages. The end result is that the court likely fails to apply the message test in a very meaningful way, and then likely applies the *O'Brien* test in a half-hearted way weakening that intermediate test. Typical is the Sixth Circuit case where the court found no free speech issue in a student's refusal to abide by a school dress code because she preferred clothing that she looked good in.[378] Nonetheless, because of the student's overbreadth claim, the Court then assumed some free speech and found that the *O'Brien* test justified the regulation.[379] What should have been a clear holding that dress codes do not raise symbolic speech issues became—at least in some ways—support for the fact that they do. In another case involving the parking of immobilized cars directly in front of entrances to abortion clinics, because of the overbreadth of the law the lower court treated this action as speech; but applying the *O'Brien* test, unprotected speech.[380] Treating the blocking of entrances to buildings as possible speech only adds to the confusion inherent in the message test. This use of the overbreadth doctrine contributes to the lack of needed doctrinal development. The courts can say that whether particular expressive conduct is speech or not, the law may reach speech or symbolic speech that is protected. The hard issue, for example, whether a nude in a box is speech, is left unanswered, in favor of the conclusion that Shakespeare is protected. The end result is that activity that should not be protected, is; difficult questions are left unanswered; and new laws are written. And then it starts all over again.

Fourth, if the expressive conduct is borderline speech, it is likely that any reasonable state interest will pass the *O'Brien* intermediate test or the similar time, place, and manner version. While not uniformly true, the application of *O'Brien* in these cases does not reflect a very high standard. One court that

---

377. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 771 (1982) ("This case, which poses the question squarely, convinces us that the rationale of *Broadrick* is sound and should be applied in the present context involving the harmful employment of children to make sexually explicit materials for distribution.").

378. *Blau*, 401 F.3d 381.

379. *Id.* at 391.

380. United States v. Brock, 863 F. Supp. 851 (E.D. Wis. 1994).

found the *O'Brien* test was not met even called the test a "relatively lenient standard."[381] The Sixth Circuit found that a student's refusal to abide by a school dress code because she preferred clothing that she looked good in did not raise free speech issues.[382] Nonetheless, because of the student's overbreadth claim, the court then assumed some free speech and found that the *O'Brien* test easily justified the regulation.[383] In applying the *O'Brien* test, the court concluded that the dress code furthered such "important governmental interests" as "bridging socio-economic gaps between families," "increasing school unity and pride," and "improving children's self-respect and self-esteem."[384] None of these so called important interests would seem to knock your socks off. The Fifth Circuit likewise found that even assuming that free speech was involved in a school required uniform policy, applying *O'Brien*, no free speech rights were violated.[385] In another case, a man's son had been killed in a high-speed police chase.[386] He kept his son's wrecked truck in his front yard as a protest of such police tactics.[387] The court found that city laws against

381. Dayton v. Esrati, 707 N.E.2d 1140, 1145 (Ohio Ct. App. 1997). The gadfly plaintiff wore a "ninja" mask described as "similar to a ski mask except that it had one large hole for the eyes," to protest the high handedness of the city council in limiting his comments at open meetings. *Id*. at 1143. He had actually told the police chief that he intended to make a statement at the next meeting involving head gear. *Id.* It had been speculated that he might wear Mickey Mouse ears. *Id*. He was ordered removed from the meeting when he refused to remove his mask and when he refused to leave was arrested for disturbing a public meeting. *Id.* It is not clear exactly what his message was, but the court said that "general dissatisfaction with the government's conduct" was sufficiently particular. *Id*. at 1144. Despite the mayor's claim that he was concerned that the plaintiff might be a "terrorist," the court concluded that the *O'Brien* test failed because the gadfly's removal was related to his message and was not content-neutral. *Id*. at 1147.

382. *Blau*, 401 F.3d 381.

383. *Id*. at 391-92.

384. *Id*. at 391.

385. Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 443 (5th Cir. 2001). The court was actually very sympathetic to the notion that dress might be sufficiently communicative to be protected as speech, but ultimately was only willing to assume that it was speech. In applying *O'Brien*, which it called "virtually the same" as the time, place, and manner test, it said, "[i]mproving the educational process is undoubtedly an important interest" which included "enacting the uniform policy [in order] to increase test scores and reduce disciplinary problems throughout the school system." *Id.*; *see also* Isaacs *ex rel.* Isaacs v. Bd. of Educ. of Howard County, Md., 40 F. Supp. 2d 335 (D. Md. 1999). The school had a "no hat" policy except for religious garb. *Id*. at 336. One student claimed that the policy violated her free speech right to wear a multicolored headwrap "to celebrate her African-American and Jamaican cultural heritage." *Id*. The court assumed that the headwrap was protected free speech, but concluded that "it is clear that the rule furthers an important government interest: providing a safe, respectful school environment that is conducive to education and learning." *Id*. at 338.

386. Davis v. Norman, 555 F.2d 189 (8th Cir. 1977).

387. *Id*. at 190.

storage of vehicles on the front yard to be primarily a regulation of conduct with only an incidental impact on speech.[388] The court nonetheless applied the *O'Brien* test,[389] concluding that the city ordinance "serves the basic purpose of protecting the community from the health and safety hazards created by abandoned, wrecked and inoperable vehicles."[390]

It would be claiming too much to say that the lower courts' application of *O'Brien* in these cases is uniformly weak, under protective of free speech rights, and always creating weak precedents for other free speech cases. It would not be too much to say that these cases are not uniformly strong, do not fully protect free speech rights, and often create weak precedents.

C. The Lower Courts and Other Spins on Spence

One of the more interesting things happening at the lower court level is the attempt of the courts to come to grips with the *Hurley* criticism of the particularized message requirement. Most of the lower courts continue to apply the *Spence* message test,[391] but a number of lower courts believe that *Hurley* has modified it. There are two different approaches to *Hurley* at the lower court level. First, some of the lower courts have discarded the message test as a requirement, relying exclusively on the imbued test. Second, other lower courts view the message test as being modified by *Hurley* to not require such a particularized message. Since even those courts that follow the first approach use the message test as a guidepost, there may not be that much difference between the two approaches.

First, as for those courts that have totally discarded the message test in favor of the imbued test, the most thorough discussion is out of the Third Circuit in *Troster v. Pennsylvania State Department of Corrections*[392] decided shortly after the *Hurley* case. In *Troster*, a state prison guard objected to having to wear the American flag on his prison uniform, both because he did not want to wear the flag and because he did not like that the flag had the stars facing his back which he claimed was a signal for cowardice.[393] The court viewed it

388. *Id.*

389. *Id.* at 190-91.

390. *Id.* at 191.

391. See *Bar-Navon v. School Board of Brevard County, Florida*, No. 6:06-cv-1434-Orl-19kKRS, 2007 WL 121342, at *3 (M.D. Fla. Jan. 11, 2007), where the court said that "a large majority of federal Circuit Courts continue to apply the *Spence-Johnson* test in determining whether non-verbal actions and gestures constitute expressive conduct under the meaning of the First Amendment."

392. 65 F.3d 1086 (3d Cir. 1995).

393. *Id.* at 1088.

primarily as a compelled speech case,[394] but only if speech was involved.[395] The court said that the Third circuit had previously adopted the particularized message test, but after *Hurley* that was "no longer viable."[396] It reasoned that in *Spence* the Supreme Court did not say that the message test was required, but had only observed that Spence's symbolic modification of the flag did carry such a message.[397] This led the *Troster* court to conclude that the correct test under *Hurley* was the imbued test, not the message test, and that the nature, context, and environment were to be considered as part of the imbued test.[398] In applying the test, it did not see that requiring Troster to have a star-facing-backwards American flag patch compelled anything that was imbued with any communicative aspect, nor did the court accept the claim that refusing to wear the patch was protected symbolic speech.[399] In a later Third Circuit case,[400] the court said that under *Troster* the *Spence* message requirements "set signposts rather than requirements, and that its two factors can no longer be viewed as the only criteria."[401] It confirmed that it would apply the imbued test, including considerations of nature, context, and environment in "a fact-sensitive, context-dependent inquiry."[402]

Second, a number of lower courts believe that *Hurley* has not eliminated the message test but only modified it so that more expressive conduct will be found to be symbolic speech. In a recent case challenging a school dress code, the Sixth Circuit applied the message test, but a speech friendly version of it with a very low threshold.[403] Although a particularized message with a great likelihood of being understood was still required, it said, "a narrow, succinctly

394. *Id.* at 1087; *see also* Wooley v. Maynard, 430 U.S. 705 (1977).

395. *Troster*, 65 F.3d at 1089-90.

396. *Id.* at 1090.

397. *Id.* at 1090 n.1.

398. *Id.* at 1090.

399. *Id.* at 1094. In a tortuous footnote, comparable only to the plot of *The Terminator (I)*, the court did not accept that refusing to obey the compelled act was protected speech if the compelled act was not invalid compelled speech. *Id.* at 1095 n.9. To illustrate, it analogized to protected flag burning, stating: "Indeed, even a person who burns a flag to protest a statute prohibiting flag burning would not have the same derivative structure to his or her claim." *Id.* Perhaps only John Connor, who would not have existed had his father not traveled back into time and successfully avoided the Terminator—as brilliantly played by now California Governor Arnold Schwarzenegger—could explain this reasoning. *But see* United States v. Haggerty, 731 F. Supp. 415 (W.D. Wash. 1990) (involving the burning of a United States Postal Service flag for purposes of protesting the Flag Protection Act of 1989 which became law just minutes before).

400. Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002).

401. *Id.* at 160.

402. *Id.* at 160-61.

403. Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 388 (6th Cir. 2005).

articulable message" was not required.[404] How it was possible to be one without the other was not explained. In the context of a school dress code challenge, perhaps no careful consideration of the issue was required,[405] but a number of other cases have used similar language.[406]

Holloman ex rel. Holloman v. Harland,[407] a case out of the Eleventh Circuit also applied a modified version of the message test. The case involved a student who was punished for holding his fist up during the saying of the pledge of allegiance, but otherwise remained silent.[408] The student was actually protesting that someone else had been orally reprimanded for failing to say the flag salute.[409] After noting that under *Barnette*, this was likely protected symbolic speech and after stating the *Spence* message test, the court referred to *Hurley* and said that it had "liberalized" the message test. Under *Hurley*, "a narrow, succinctly articulable message is not a condition of constitutional protection . . . . Thus, in determining whether conduct is expressive, we ask whether the reasonable person would interpret it as *some* sort of message, not

---

404. *Id.* (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569 (1995)). In *Blau*, the court said:

> The protections of the First Amendment do not generally apply to conduct in and of itself. To bring a free-speech claim regarding actions rather than words, claimants must show that their conduct "convey[s] a particularized message" and "the likelihood [is] great that the message [will] be understood by those who view[] it." The threshold is not a difficult one, as "a narrow, succinctly articulable message is not a condition of constitutional protection."

Id. (quoting *Hurley*, 515 U.S. at 569; Texas v. Johnson, 491 U.S. 397, 404 (1989); Spence v. Washington, 418 U.S. 405, 411 (1974)) (citations omitted) (alterations in original).

405. In *Blau*, despite finding no free speech rights as to the plaintiff—who the court said wanted to wear clothes she "feel[s] good in," as opposed to having a desire to express "any particular message"—the court found that the law might be an overbroad regulation of the free speech of others. *Blau*, 401 F.3d at 386 (alteration in original). It applied the *O'Brien* test and concluded that the governmental interest passed that test. *Id.* at 393.

406. In *Zalewska v. County of Sullivan, New York*, 316 F.3d 314 (2d Cir. 2003), a county work uniform policy prohibiting the wearing of a skirt to work was claimed to violate freedom of expression rights. *Id.* at 319. The court, similar to *Blau*, combined *Hurley* and *Spence* into a single test:

> To be sufficiently imbued with communicative elements, an activity need not necessarily embody "a narrow, succinctly articulable message," but the reviewing court must find, at the very least, an intent to convey a "particularized message" along with a great likelihood that the message will be understood by those viewing it.

Id. (quoting *Hurley*, 515 U.S. at 569; *Johnson*, 491 U.S. at 404; *Spence*, 418 U.S. at 411) (citations omitted); *accord* Grzywna *ex rel.* Doe v. Schenectady Cent. Sch. Dist., 489 F. Supp. 2d 139 (N.D.N.Y. 2006).

407. Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1270 (11th Cir. 2004).

408. *Id.* at 1261.

409. *Id.*

whether an observer would necessarily infer a *specific* message."[410] Although the student's message was somewhat obtuse, requiring some knowledge of the prior incident, the court said that "his fist clearly expressed a generalized message of disagreement or protest," and after *Hurley* that was enough.[411] Interestingly, the court also surmised that the fist might be "pure speech"[412] but whether symbolic speech or pure speech, it was protected.[413]

Several courts have made the point that *Hurley*'s criticism of the particularized message test has no application to cases involving pure speech, only cases involving symbolic speech. As to pure speech, there would be no need to show that it was imbued with communicative aspects or that the message be particularized and capable of being understood. One court found a mathematician's cryptographic computer source code, incomprehensible to most ordinary people, to be pure speech: "A computer program is so unlike flag burning and nude dancing that defendants' reliance on conduct cases is misplaced."[414] It analogized the computer program to speaking in a foreign language and quoted another case[415] involving an Arizona law requiring English as the official language:

> Of course, speech in any language consists of the 'expressive conduct' of vibrating one's vocal chords, moving one's mouth and thereby making sounds, or of putting pen to paper, or hand to keyboard. Yet the fact that such 'conduct' is shaped by language—that is, a sophisticated and complex system of understood meanings—is what makes it speech. Language is by definition

410. *Id.* at 1270 (quoting *Hurley*, 515 U.S. at 569) (internal quotation marks omitted).

411. *Id.*

412. *Id.*

413. One of the most comprehensive surveys of the treatment of *Hurley* by the lower courts is found in *Bar-Navon v. School Board of Brevard County, Florida*, No. 6:06-cv-1434-Orl-19KRS, 2007 WL 121342 (M.D. Fla. Jan. 11, 2007), a case involving the claim that excessive body piercing was protected symbolic speech. The case is probably the poster child for one of the evils of the ambiguities of *Spence*'s definition of speech—that it will lead the court to give excessive attention to questionable free speech claims. The court in *Bar-Navon* ultimately found it unnecessary to decide whether *Hurley* had changed the test since no message, particularized or otherwise, was communicated by body piercings. *Id.* at *4.

414. Bernstein v. U.S. Dep't of State, 922 F. Supp. 1426, 1435 (N.D. Cal. 1996); *see also* Giebel v. Sylvester, 244 F.3d 1182, 1186-87 (9th Cir. 2001) (handbills posted for the purpose of conveying information and that do convey information to the extent they are observed constitute protected speech). *Contra* Junger v. Daley, 8 F. Supp. 2d 708 (N.D. Ohio 1998), *rev'd*, 209 F.3d 481 (6th Cir. 2000).

415. Yniguez v. Arizonians for Official English, 69 F.3d 920 (9th Cir. 1995).

> speech, and the regulation of any language is the regulation of speech.[416]

The *Johnson* "overwhelmingly apparent" phrase has generated far less interest than the *Hurley* spin. A few lower courts have viewed it as a restrictive limit on the type of expressive conduct that can be found to be speech. In one such case, the court rejected a law professor's free speech claim involving regulations restricting export of encryption software but with an unusually restrictive take on the message test.[417] Though citing both the *Spence* imbued test and the message test, the court applied a stricter version of the message test, which it found justified by *Johnson*.[418] The court concluded:

> Unlike *Johnson*, the communicative nature of encryption source code is not "overwhelmingly apparent." Instead, source code is by design functional: it is created and, if allowed, exported to do a specified task, not to communicate ideas. Because the expressive elements of encryption source code are neither "unmistakable" nor "overwhelmingly apparent," its export is not protected conduct under the First Amendment.[419]

Using this language in *Johnson* to limit the kinds of expressive conduct that can be speech seems totally unjustified. The Court in *Johnson* just said that the burning of the flag was an obvious and strong communication of a particularized message of political dissent. There is nothing to indicate that the Court intended to require that such a message had to be, not just particularized, but obviously particularized. Nonetheless, once the *FAIR* court held up the "overwhelmingly apparent" phrase as being important in finding speech, it is highly likely that the lower courts will follow suit. *FAIR* is such a recent case that it has not been interpreted by lower courts extensively, but it was only two months after *Hurley* that the first federal court used it to liberalize the message test. It will likely not be long before lower courts unsympathetic to symbolic speech or sick to death of trivial claims of speech use the *Johnson* spin to reject some expressive conduct as speech that would be protected under the normal *Spence* test.

VI. Conclusions—The Spence *Test's Current Status*

The Supreme Court has, at best, established a general outline for determining when expressive conduct is to be treated as speech. The Court in *O'Brien* said

416. *Bernstein*, 922 F. Supp. at 1435 (quoting *Yniguez*, 69 F.3d at 934-35).
417. *Junger*, 8 F. Supp. 2d 708.
418. *Id.* at 717.
419. *Id.* at 717-18.

that there was an "apparently limitless variety of conduct" that may be expressive but not protected as free speech.[420] In *Stanglin* the Court seemed to make the same point, saying that a "kernel of expression" is found in almost every activity, even walking down the street, but that such a kernel of expression is not sufficient to be protected as free speech.[421] The Court in *Johnson* said that the person arguing that their conduct was speech had the burden of proving it, in essence proving that their conduct was more than just that limitless variety of conduct that was at best a mere kernel of expression.[422]

Still, the first part of any test must be that the expressive conduct is close to what we think of as speech. The Court has variously described just how close that must be. The Court in *Barnette* had described the use of symbols as "a primitive but effective way of communicating ideas," calling it a "short cut from mind to mind."[423] The Court in *Tinker* referred to the wearing of black arm bands as "closely akin to 'pure speech.'"[424] *Spence* tells us that, to be protected, the conduct must be "imbued with elements of communication."[425] The Court in *Johnson* referred to the burning of the American flag as "[p]regnant with expressive conduct."[426] Justice Scalia used the expression "conventionally expressive" in rejecting topless dancing as speech.[427] In *Hurley* and *FAIR*, the Court referred to "the inherent expressiveness" of certain types of conduct.

All of these concepts—"mind to mind," "closely akin," "imbued with," "pregnant with," "conventionally/inherently expressive"—seem to be essentially synonymous. They all express that one person has connected with another person in a way similar to how words connect us. They seem to encompass two different concepts. First, communication has taken place. Second, the expressive conduct, as opposed to its message, should not, in and

420. United States v. O'Brien, 391 U.S. 367, 376 (1968).

421. City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989). The Court, in rejecting social dancing as a free speech activity, stated: "It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Id.*

422. Texas v. Johnson, 491 U.S. 397, 403-06 (1989).

423. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

424. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969).

425. Spence v. Washington, 418 U.S. 405, 409 (1974).

426. *Johnson*, 491 U.S. at 405.

427. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 577 n.4 (1991) (Scalia, J., concurring) (stating Justice Scalia's preference for the term "conventionally expressive" over the Court's phrase "inherently expressive").

of itself, be threatening to our sense of security. It is acceptable if the idea creates chaos, but not if the method of communicating does.[428]

The *Barnette* phrase "mind to mind" very nicely captures the first, that almost intuitively we should know that communication has taken place. Still, "mind to mind" might not distinguish expressive conduct that is unprotected, such as violence or "mindless nihilism" from a pristine symbol of communication like standing mute in lieu of saying the Pledge of Allegiance. The other framings—closely akin, imbued with, pregnant with, and inherently expressive—perhaps better indicate that just being expressive is not enough to be protected as free speech. The simplicity of Spence's peace symbol on an upside down flag, though perhaps not the anxious plea that the Court claimed it to be, is nonetheless far different than what the Court called "mindless nihilism." To call the latter speech would be pointless, since surely the governmental interest in preventing it would outweigh its value as free speech. The ease of outweighing speech would then present just another case where state interests outweighed free speech interests, providing little comfort for free speech in later cases.

However unhelpful the *Spence* message test is, it does not seem that it would require much for the Supreme Court to give it some meaning.[429] It does not

---

428. Tiersma identifies communication as involving "a conscious transfer of information," using as an example smoke as opposed to smoke signals. Tiersma, *supra* note 36, at 1553. He cites six factors as evidence of an attempt to communicate: (1) An audience, (2) ritual, (3) repetition, (4) duration, (5) non-functionality, and (6) the communicative context. *Id.* at 1563-69.

429. The Supreme Court has denied certiorari in a number of cases that would have clarified symbolic speech issues. It is understandable why the Supreme Court denied certiorari in 1982 for a case such as *Kime*, where a person was sentenced to eight months in prison for burning the American flag. Kime v. United States, 459 U.S. 949 (1982); *see also supra* note 171. The Court may not have been ready to decide such a controversial issue at that time. Since the lower court only assumed free speech in *Ferrell*, a 1968 case involving hair style at a public school, the symbolic speech issue may not have been enough in play, but such an early decision would have clarified a much litigated issue. Ferrell v. Dallas Indep. Sch. Dist., 392 F.2d 697 (5th Cir. 1968); *see also supra* note 320 and accompanying text. In 1994, the Court denied certiorari in *Brock*, involving cars blocking the entrance to an abortion clinic. United States v. Brock, 863 F. Supp. 851 (E.D. Wis. 1994); *see also supra* note 380 and accompanying text. *Brock* allowed defendants, who seemed clearly not to have engaged in conduct protected as speech, to litigate the overbreadth of a federal law before concluding that the law was not overbroad. *Brock*, 863 F. Supp. at 866-67. If there is any area that needs clarification, it is the overbreadth doctrine as applied to expressive conduct. In *Troster*, the Court denied certiorari in a case where the Third Circuit found that *Hurley* had modified the *Spence* message test. Troster v. Pa. State Dep't of Corr., 65 F.3d 1086 (3d Cir. 1995); *see also supra* note 392 and accompanying text. Although Troster's objection to wearing a work uniform with an American flag on it was a weak free speech case, this would have been a nice case to clarify the impact of the *Hurley* criticism of *Spence*. Certiorari was also denied in 1993 in *Steirer*, which involved an

help that the Court has begun to snipe among itself whether requiring a particularized message protects too little symbolic speech or too much. Such a debate might have been useful had the Court put the topic on the table and had a reasoned discussion as to whether *Spence*, *Hurley*, or *Johnson/FAIR* best frames the "clarity of the message" from the "expressive conduct" conundrum before the conduct would be protected as speech. Unfortunately, that is not what appears to have happened. *Hurley* attacked the test as being under protective in a case not involving symbolic speech, and *FAIR* hints at an attack on it as being over protective in a case not involving speech at all, as it turns out. The fact that *Spence*'s requirement of a particularized message is attacked on both sides makes it appear to be the appropriate balance between competing choices.

Whatever the difficulties of defining symbolic speech, at the minimum, expressive conduct is not to be rejected as speech because of the power of its message or the uniqueness of its symbols—who would have thought that a burning draft card could have generated such heat. The governmental intent test that Justice Scalia has championed and that the majority of the Court cites with approval seems a useful addition to the *Spence* test. It recognizes explicitly that the content of the message is not a valid basis for rejecting free speech protection for expressive conduct. Content-based regulations of expressive conduct are as presumptively invalid as content-based regulations of public forums. It is difficult to know the proper balance between governmental interests and claimed rights of communication, but suppressing a particular content should not be a valid part of the weighing process. Other than the early civil rights cases, the flag burning cases, and arguably *O'Brien*, few of the symbolic speech cases involve an attempt to control the content of speech, which makes the imbued and message tests so important.

The imbued test and the message test work independently, as well as a unit. If the expressive conduct is sufficiently imbued with communicative elements, the quality of the message should be of little concern. All communicative symbols and gestures should be placed in this category. There would be no need to consider what Spence's message was; his flag alone was sufficiently imbued with communicative elements. The same should be true if the expressive conduct was clearly not imbued with communicative elements. Violence is so clearly removed from any acceptable definition of speech that any consideration of message would be pointless, except to give the violent

---

exceptionally weak claim of free speech protection, even by the standard of many of these cases. Steirer *ex rel.* Steirer v. Bethlehem Area Sch. Dist., 987 F.2d 989 (3d Cir. 1993); *see also supra* note 348. The lower court had rejected the claim that a mandatory sixty hours of community service as a graduation requirement at a public high school was compelled speech. *Steirer*, 987 F.2d at 994-95.

action more credence than it would deserve. At both extremes, the imbued test should control the outcome. The lower courts have already done this to some degree. Very few lower court cases rely exclusively on the imbued test, but those that do tend to involve expressive conduct that is either obviously not speech or obviously speech.

Likewise, if the person claiming that their expressive conduct is speech has communicated no particular message, then the message test could be determinative without any reference to the imbued test. There would be no reason to explore whether a flag used as an automobile ceiling liner was speech if no message of any kind was apparent. A student who did not wear a required uniform because it was not clean ought not to be litigating speech issues. Many of the lower courts certainly seem to do this without necessarily acknowledging it. They state the test and then conclude the test was not met. The message test has a surface simplicity that encourages the lower courts to leap into the fray. Unlike the imbued test where there is a dearth of cases, there are literally dozens of cases interpreting the message test. Unfortunately, no pattern emerges. For every case that finds that something is a message, another court will find that it is not.[430] It does appear, generally, that the lower courts are predisposed to find, or at least to assume, that non-violent acts pass the message test, and this despite the burden of proof being on the person claiming speech. This appears to be due to two factors. First, lower courts seem to be more sympathetic to overbreadth claims than does the Supreme Court. In many cases where the primary conduct is rejected as being speech, the lower court will nonetheless undertake a free speech analysis because the law might be used in other cases to restrict expressive conduct that is speech. Second, lower courts find it easy to apply the intermediate test, whether *O'Brien* or the time, place, and manner version, in such a way that the governmental interest outweighs the harm done to free speech. This is, quite possibly, because of the weak conviction behind the sense that any significant free speech rights are involved.

Harder cases should involve a more careful consideration of both factors. As the expressive conduct becomes more ambiguously connected to speech, a higher quality of message might be required. The quality of the message resolves the ambiguity as to whether the conduct is sufficiently like speech.

---

430. Compare the lower court flag burning cases prior to the Supreme Court's *Johnson* decision in 1989, which found that burning the flag was protected symbolic speech. *Johnson*, 491 U.S. 397. The lower courts were almost evenly split. Finding protected speech were the lower courts in *Monroe v. State Court of Fulton County*, 739 F.2d 568 (11th Cir. 1984); *People v. Payne*, 565 N.Y.S.2d 389 (N.Y. City Crim. Ct. 1990); and *Johnson v. State*, 755 S.W.2d 92 (Tex. Crim. App. 1988), *aff'd*, 491 U.S. 397. Finding no speech were *United States v. Crosson*, 462 F.2d 96 (9th Cir. 1972); *People v. Sutherland*, 329 N.E.2d 820 (Ill. App. Ct. 1975); and *State v. Farrell*, 209 N.W.2d 103 (Iowa 1973), *vacated*, 418 U.S. 907 (1974).

Frustratingly, little of this development has taken place. At the lower court level, the *Spence* test is applied with little genuine insight, but given the imprecision of the message test, it is hard to know how the lower courts could do more.

Compounding the difficulty, when hard choices have had to be made, the Supreme Court and the lower courts have often taken the easy way out, assuming that speech was involved, and then concluding that under *O'Brien*, or some related test, that the restriction on the expressive activity was constitutional.[431] This approach does disservice to both the need to develop a better understanding of the *Spence* factors, or some new factors, and to the underlying free speech test. Because the Court's insincerity in finding speech is so obvious, there is little respect for the underlying free speech tests.

The more obvious lines, that violence is not symbolic speech but gestures are, do not create the issues. It is the line between acts of theater and acts of civil disobedience that needs clarification. The phrases synonymous to "imbued with"—such as "closely akin," "pregnant with," or "inherently expressive"—might eventually help if the Supreme Court will only attempt some clarification. It is tempting to think in terms of Justice Stewart's famous quip about pornography, "I don't know how to define it, but I know it when I see it."[432] But that does not really work. I recall Professor Kalven claiming that Stewart's point was that if unprotected speech was limited to hard core pornography, anyone could know it, our police, judges, and juries. The ultimate sex acts that constituted that category of sexual explicit speech were easily observable. Symbolic speech on the other hand has no easily observable form. It is more like the statement about pornography, "It's in the groin of the beholder."[433] "Groin to groin" has the same ambiguity as does "mind to mind."

---

431. The overbreadth doctrine contributes to lack of doctrinal development as well. The courts can say that whether particular expressive conduct is speech or not, the law may reach speech or symbolic speech that is protected. The end result is that activity that should not be protected is, difficult questions are left unanswered, new laws are written, and it all starts over again.

432. This is a paraphrase of his actual statement in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Justice Stewart, frustrated at the line of cases attempting to define unprotected sexually explicit speech, said that unprotected speech was "constitutionally limited to hard-core pornography." *Id.* He then continued,

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

Id.

433. Charles Rembar celebrated his victory in a book strikingly titled *The End of Obscenity*. Published in 1968, it gave us the aphorism that pornography is "in the groin of the beholder." William F. Buckley, Jr., *Porn, Pervasive Presence: The Creepy Wallpaper of Our Daily Lives*,

We sense it, but it is very hard to define, and perhaps impossible to identify definitively.

One of the powers of symbolic speech is that the symbols will always change as the current hot issues of the day change. Just as one can hardly imagine a school principal caring whether a student has a Beatles haircut—in fact likely being grateful for such a normal look—it would be impossible to know what will be the next controversial symbol.[434] When someone finds something new to burn, the lower courts have little guidance about whether that is as imbued with communicative elements as was the burning of draft cards, flags, and crosses. Ultimately, until the Supreme Court undertakes to clarify when expressive conduct is speech, the lower courts will continue to wander aimlessly, the trivial will be treated as though it were speech, and expressive conduct with the power to move from "mind to mind" will be undervalued and under protected.

NAT'L REV., Nov. 19, 2001, at 38, 44.

434. The most recent hot symbol is an unfortunate one. In recent news stories, symbolic speech issues were raised involving hangman nooses hanging from a tree which led to a race related fight and controversial charges against black defendants (the "Jena 6"); two hangman nooses hanging from the back of a pick-up truck; and miniature hangman nooses in national guard outfits, one in an African American's locker. Steve Benen, *A Symbol of Hate Making an Unwelcome Comeback*, THE CARPETBAGGER REPORT, Oct. 20, 2007, http://www.the carpetbaggerreport.com/archives/13306.html; *Coast Guard Tries to Deal With Noose Incidents*, CNN.COM, Oct. 4, 2007, http://www.cnn.com/2007/US/10/04/coast.guard.nooses/; Adam Nossiter, *Black Youth, Conviction in Beating Voided, Will Stay Jailed*, N.Y. TIMES, Sept. 22, 2007, at A12, *available at* http://www.nytimes.com/2007/09/22/us/22jena.html?_r=1&oref =slogin. Added to that list is another noose sent to a Columbia University political science professor. *See* Benen, *supra*. According to news reports, there have been many others. *Id.* One of the more positive recent symbols was the wearing of pink jerseys by public school students to express disapproval of school bullies and support for the victims of such abuse. *N.S. Students Rebuke Bullies by Wearing Pink*, TORONTO STAR, Sept. 22, 2007, at A20, *available at* http://www.thestar.com/News/article/259314. And what could be more ubiquitous than the emoticon. As Stephen Colbert wrote recently, "Frankly, I prefer emoticons to the written word, and if you disagree :(" Stephen Colbert, Op-Ed., *I Am an Op-Ed Columnist (And So Can You!)*, N.Y. TIMES, Oct. 14, 2007, § 4, at 13, *available at* http://www.nytimes.com/2007/10/14/ opinion/14dowd.html?em.